MISSISSIPPI LAW JOURNAL

ARTICLES

THE UNIFORM PROBATE CODE: AN OPPORTUNITY FOR MISSISSIPPI LAWYERS TO BETTER SERVE THE WEAK AND THE GRIEVING

Donald L. Robertson

EFFECTIVE COUNSEL FOR PERSONS FACING CIVIL COMMITMENT: A SURVEY, A POLEMIC, AND A PROPOSAL

Elliott Andalman and David L. Chambers

COMMENTS

THE FAIR CREDIT REPORTING ACT AMENDMENTS: ENFORCEMENT OF THE LEGISLATIVE TRUST?

APPELLATE COURT REFORM

MINIMUM FEE SCHEDULES V. ANTITRUST: THE GOLDFARB AFFAIR

NO-FAULT DIVORCE: A PROPOSAL FOR MISSISSIPPI

GROUP AND PREPAID LEGAL SERVICES

THE JUDICIAL PHILOSOPHY OF WILLIAM H. REHNQUIST

VOLUME 45 JANUARY 1974 NUMBER 1

An Exclusive Service for Harrison's Mississippi Code 1972 Annotated Subscribers.

Because of the inconvenience, at times, of working with several volumes of the annotated code, The Harrison Company saw the need to provide a practical and quick access to the statutory law. The result is the Subscriber's Unannotated Service Desk Book.

This service is not for sale. The Harrison Company has prepared this desk book for the exclusive use of its subscribers, and it may only be obtained as a complimentary service resulting from the purchase from The Harrison Company of a set of the Mississippi Code 1972 Annotated.

This convenient one volume desk book contains the statutory material found in all volumes of the Mississippi Code 1972 Annotated.

NEW FLEXIBLE BINDER MAKES THIS DESK BOOK AS EASY TO USE AS YOUR TELEPHONE DIRECTORY!

Specifications
3¼" × 9½" × 10¼"
Brown simulated leather
vinyl and gold foil stamped

Dial (404) 522-7242, Our 24 Hour Customer Service Desk

THE HARRISON COMPANY, PUBLISHERS
178 - 180 Pryor Street • Atlanta, Georgia 30303

Call us any time . . . for services rendered by Mississippi's largest Trust Department. We at Deposit Guaranty National Bank welcome the opportunity to work with attorneys in serving the needs of their individual and industrial clients. Services are offered in matters involving trusts, wills, estates, pension programs and retirement plans. Call us at any time . . . we look forward to hearing from you.

TRUST DEPARTMENT
DEPOSIT GUARANTY NATIONAL BANK
GROW WITH US/JACKSON, MISS./MEMBER F.D.I.C.

Handwriting Expert

GILBERT J. FORTIER, JR.

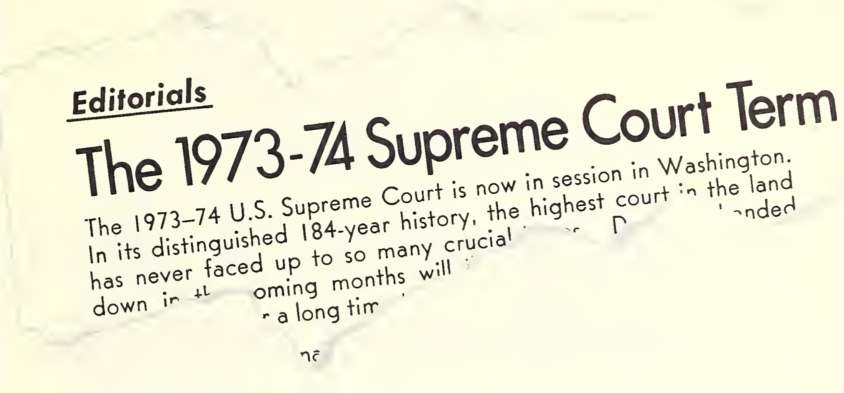
Examiner of Questioned Documents

Since 1946

3024 DE SOTO ST. — PH. (504) 482-8160
NEW ORLEANS, LA. 70119

Teamwork. Mid-South Title's National Department works hand-in-hand with Mississippi attorneys in real estate title matters—an important reason we lead the league in the Mid-South. Sole agent for Commerce Title Guaranty Co.

MID-SOUTH TITLE COMPANY
12 South Main Street Memphis, Tennessee 38103
W. J. "Bill" Gallagher, Vice Pres. 901/523-8121



Editorials

The 1973-74 Supreme Court Term

The 1973–74 U.S. Supreme Court is now in session in Washington. In its distinguished 184-year history, the highest court in the land has never faced up to so many crucial ... D... nded down in ... oming months will ... a long tim...

From all sides have come the editorials and commentaries: The U.S. Supreme Court is now in its most critical term. Not only are significant constitutional issues being decided, but also other vital questions that will affect everyone.

That is why every lawyer must be constantly and fully informed on what's happening. Decisions handed down will have inevitable impact on his practice and his clients.

Keep informed with Supreme Court Reporter. For the small investment of $43.50, you get twice-a-month advance sheets for the entire term of the court—plus 2 beautifully-bound permanent volumes. See your West representative or send a check today (or charge to your West account).

WEST PUBLISHING COMPANY

Frank R. Martin
P.O. Box 1781
Jackson, Miss. 39205
Phone: 601/362-2096

Put us on retainer for all your investment needs.

Many smart Mississippi lawyers do. They know First Federal of Jackson is the safe, profitable place to earn big interest on short-term investments and larger estate funds and court controlled funds.

Money deposited in a Daily Interest Passbook Account starts earning the moment you put it in, and keeps on earning every single day until you take it out again. Great for your own idle operating funds or money that will soon be transferred.

For estate funds, court controlled funds and other large sums, First Federal's Quarter Fund Passbook Account or Silver Six Certificates of Deposit are also guaranteed ways to earn a higher return for you or your clients. All accounts are insured by the FSLIC, an agency of the United States.

We know you're busy, so accounts may be opened, maintained and drawn upon entirely by telephone or mail, or . . . we'll come to you. And each transaction is held in strictest confidence. Why not retain us as your place for profitable investments. We'd be glad to hear from you.

FIRST FEDERAL of JACKSON

The Savings Place.

P. O. Box 1818/Jackson, Mississippi 39205/
Phone 948-8700, Ext. 202

WE
PRINT IT
BETTER

Darby Printing Company
715 W. Whitehall St., S.W.
Atlanta, Georgia 30310

1-404-755-4521

Darby

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL OF LAW

VOLUME 45 JANUARY 1974 NUMBER 1

Copyright ©1974, Mississippi Law Journal

CONTENTS

ARTICLES

THE UNIFORM PROBATE CODE: AN OPPORTUNITY FOR MISSISSIPPI LAWYERS TO BETTER SERVE THE WEAK AND THE GRIEVING .... *Donald L. Robertson* 1

EFFECTIVE COUNSEL FOR PERSONS FACING CIVIL COMMITMENT: A SURVEY, A POLEMIC, AND A PROPOSAL .... *Elliott Andalman and David L. Chambers* 43

COMMENTS

THE FAIR CREDIT REPORTING ACT AMENDMENTS: ENFORCEMENT OF THE LEGISLATIVE TRUST? 95

APPELLATE COURT REFORM 121

MINIMUM FEE SCHEDULES v. ANTITRUST: THE GOLDFARB AFFAIR 162

NO-FAULT DIVORCE: A PROPOSAL FOR MISSISSIPPI 179

GROUP AND PREPAID LEGAL SERVICES 208

THE JUDICIAL PHILOSOPHY OF WILLIAM H. REHNQUIST 224

RECENT DECISIONS

CONSTITUTIONAL LAW—PRIVATE SCHOOLS' ADMISSIONS POLICIES BASED SOLELY ON RACE VIOLATE RIGHT TO CONTRACT GUARANTEED BY SECTION 1981 (*Gonzales v. Fairfax-Brewster School, Inc.*, D. Va. 1973). 246

CONTRACTS-DEALER FRANCHISES-TERMINATION OF FRANCHISE WITHOUT GOOD CAUSE IS VOID AS AGAINST PUBLIC POLICY (*Shell Oil Co. v. Marinello*, New Jersey 1973) 252

CORPORATIONS-SECURITIES REGULATION-OUTSIDER TIPPEES ARE LIABLE TO CORPORATE SHAREHOLDERS FOR PARTICIPATING IN BREACH OF FIDUCIARY DUTY (*Schein v. Chasen*, 2nd Cir. 1973) 260

JURISDICTION-FORUM SELECTION-ATTACHMENT SUIT BASED ON FOREIGN CAUSE OF ACTION BY NONRESIDENT AGAINST FOREIGN CORPORATION SUFFICIENT TO CONFER QUASI IN REM JURISDICTION ON MISSISSIPPI COURT (*Steele v. G.D. Searle & Co.*, 5th Cir. 1973) 267

BOOK REVIEW

A PUBLIC CITIZEN'S ACTION MANUAL . . . . *Stanley L. Taylor, Jr.* 276

BOOK NOTES

AFTER CONVICTION 278

THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 278

The MISSISSIPPI LAW JOURNAL is published by University of Mississippi law students five times annually in January, April, June, September, and November. Editorial and business offices: Mississippi Law Journal, P. O. Box 146, University, Mississippi 38677.

Current subscription: $10.00 per year. Single issue, $2.50. Subscriptions are renewed automatically upon expiration unless the subscriber sends notice of termination.

Change of address: Members of the Mississippi State Bar send address changes to the Mississippi State Bar, P. O. Box 1032, Jackson, Mississippi 39205. All other subscribers send address changes directly to the Mississippi Law Journal. Include name, new address (including zip code) and old address. Please notify 45 days in advance to insure prompt delivery.

Unless a claim is made for non-receipt of Journal issues within six months after the mailing date, the Mississippi Law Journal cannot be held responsible for supplying those issues without charge.

Second class postage paid at University, Mississippi 38677 and additional mailing offices.

Citations conform to A Uniform System of Citation (11 ed. 1967), copyright by the Columbia, Harvard, and University of Pennsylvania Law Reviews and the Yale Law Journal.

The Mississippi Law Journal is a member of the National Conference of Law Reviews.

The JOURNAL seeks to print matter of merit and interest; being desirous of offering freedom to contributors, it assumes no responsibility for the views expressed herein.

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL OF LAW

VOLUME 45 JANUARY 1974 NUMBER 1

MEMBERS OF THE LAW JOURNAL-LAW SCHOOL LIAISON COMMITTEE

LOWELL E. GRISHAM, *Chairman*
Oxford

WILL A. HICKMAN, *Vice-Chairman*
Oxford
JOEL BLASS
Gulfport
HUGH N. CLAYTON
New Albany
ROBERT W. ELLIOTT
Ripley

ED DAVIS NOBLE, JR.
Jackson
LESTER F. SUMNERS
New Albany
GRADY TOLLISON
Clarksdale
JOEL P. WALKER, JR.
Hernando

MISSISSIPPI STATE BAR

1973-74

OFFICERS

JOE H. DANIEL of Jackson	President
JAMES HUGH RAY of Tupelo	President-Elect
W. THAD COCHRAN of Jackson	Second Vice-President
GEORGE VAN ZANT of Jackson	Executive Director and Secretary-Treasurer

COMMISSIONERS

Fred M. Bush, Jr.	Tupelo	G. F. Dabbs, III	Quitman
Norman Breland	Gulfport	Elzy J. Smith	Clarksdale
Gerald A. Gafford	Oxford	Marie P. Kepper	Hattiesburg
P. J. Townsend, Jr.	Drew	Aleita M. Sullivan	Mendenhall
Terry M. Haimes	Louisville	John Gordon Roach, Jr.	McComb
James E. Wilkerson, Jr.	Woodville	William E. Andrews, Jr.	Purvis
Jerome B. Steen	Jackson	Thomas J. Tubb	West Point
Herman W. Alford	Philadelphia	George P. Cossar, Jr.	Charleston
Gerald E. Braddock	Vicksburg	Billy Joe Landrum	Ellisville
		Charles R. McRae	Pascagoula
James H. Herring	Canton		

THE UNIFORM PROBATE CODE: AN OPPORTUNITY FOR MISSISSIPPI LAWYERS TO BETTER SERVE THE WEAK AND THE GRIEVING

*Donald L. Robertson**

> The briefest description of existing probate problems suggests complexity beyond the reach of simple remedies. The Uniform Probate Code is neither simple nor easy to describe.[1]

INTRODUCTION

The Uniform Probate Code [UPC or Code], officially promulgated by the House of Delegates of the American Bar Association on August 13, 1969,[2] must be understood as a document developed out of critical study over a period of almost 30 years. It does not attempt merely to restate existing law, nor to bring together and harmonize the best of the many dissonant American statutes respecting probate. Rather, its distinguished draftsmen—probate judges, lawyers, and teachers—sought to include within its scope, insofar as humanly possible, the constantly recurring probate matters daily confronting busy judges and lawyers. It provides practical solutions for practical problems. Every word of the Code has passed muster before gimlet-eyed veterans of the law. If there be omission in the Code, it will be in the area of foresight and not of hindsight.

The UPC comprises all relevant and necessary substantive and procedural elements of the law pertaining to the two principal areas of probate, which are (1) devolution of property at death, whether by intestate or testate succession, and (2) protection of the property and provision for the personal needs of minors or other disabled or incapacitated persons. A complete summary of Code coverage is provided in the "long title of the Code" which "should be adapted to the constitutional, statutory requirements and practices of the enacting state."[3] Existing statutes covering these areas would have to be repealed. However, if our legislature should decide that the policy reflected by an old statute is best for Mississippi, it would be simple to amend the Code. Although uniformity among the several states is desirable for a highly mobile society, there is not as great a need for national uniformity of probate legislation as there is for commercial legislation.

---

*Professor of Law, University of Mississippi. A.B. 1943, Miami University of Ohio; J.D. 1947, University of Cincinnati; LL.M. 1948, Harvard; M. Div. 1963, United Theological Seminary. Professor Robertson is also a member of the Law School Advisory Committee for the Uniform Probate Code and of the Joint Editorial Board for the Uniform Probate Code.

[1] Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 457 (1970).

[2] 55 A.B.A.J. 976 (1969).

[3] 8 UNIFORM LAWS ANN., UNIFORM PROBATE CODE 287 (1972).

The purpose of this article is to summarize the basic nature of the changes in law which would result if Mississippi should enact the UPC. A section-by-section comparison would not be advisable within present space limitations, nor would it be feasible as a framework for understanding the Code. The UPC consists of over 300 sections and in its present printing covers 278 pages.[4] Further, the Code is so unified and its provisions so interrelated that it can almost be said that each change in present law can only be understood when considered in relation to all of the other changes. Overall, however, adoption of the Code would not change Mississippi procedures as drastically as in many other states. The most significant change might well be that the Code furnishes sound solutions to many problems for which Mississippi statutes and cases provide no answer of any kind.[5]

The UPC should find, therefore, ready acceptance among Mississippi chancellors and lawyers. In probate matters the Code authorizes much of what is now being done without clear statutory authority. Present procedures often do not merely blink at the Mississippi statutes but are carried on in absolute and literal defiance thereof. The secret lies in the sensible exercise of the chancellor's discretion pursuant to the inherent equitable powers granted by the state constitution. When the interests of justice require, a Mississippi chancellor's exercise of discretion extends well beyond the measure of his fabled foot.

For example, chancery-court probate dockets record many applications and entries dispensing with inventory, appraisal, and accounting. They also reveal a considerable number of unclosed estates where the estate has proceeded no further since the probate of the will or the appointment of the personal representative or both. In most cases, the creditors and administration expenses have been paid, the property transferred, and further administration would only add unnecessary expense.[6]

---

[4] THE UNIFORM PROBATE CODE, official text with comments and index, is in pamphlet form printed by West Publishing Company.

[5] For example, see UNIFORM PROBATE CODE § 1-403 which provides means both for binding and protecting unborn or unascertained persons. This increases the marketability, and hence the value, of property subject to contingent future interest.

[6] An examination on October 30, 1973, of the unofficial Probate Docket and the retired Probate Docket in the office of the Layfayette County Chancery Clerk in Oxford, Missis-

Even less legal, but far more heartwarming, is the practice of settlement of meager estates without probate. Creditors forgive claims; employers and banks release funds; and lawyers arrange for distribution of the estate in the best interests of orphans and widows. The conscience of the community substitutes for the sanctity of the law.

I. Significant Features of the Code

Mississippi lawyers should appreciate what the authors describe as UPC's "flexible system of administration."[7] Mississippi statutes establish a unitary probate procedure requiring opening, administering, and closing a decedent's estate under the supervision of the chancery court.[8] Fortunately in Mississippi, the skillful drafting of wills and judicial waiver of rigid statutory requirements has made estate administration much more efficient than administration in other states which rigidly adhere to the form of similar statutes. The UPC achieves even more efficiency by abandoning the traditional unitary system of probate, and establishing several different procedures for administration of a decedent's estate. The selection of procedure is left to successors. A basic principle of the Code is that interested parties may choose for themselves the extent to which they wish court supervision of administration proceedings.

For very small estates, the UPC provides a procedure which requires no court administration.[9] It is called "collection of personal property by affidavit." It is not applicable to real estate, which should be transferred on real estate records by an instrument of conveyance or distribution executed by a duly appointed personal representative.

If the value of the entire estate, less liens and encumbrances, does not exceed $5,000, affidavits may be used to obtain delivery of the decedent's personal property or evidence thereof from third persons, to collect indebtedness owed to the decedent, and to require transfer of the decedent's stocks, accounts, and similar interests to the decedent's heirs or devisees.

The affidavits must show that the value of the entire estate, wherever located, less liens and encumbrances, does not exceed $5,000; that

---

sippi, revealed that a total of 322 decedent's estates were filed between January 1, 1963, and December 31, 1971. Seventy-five of these cases remain open. It does not appear that further action will be taken in these estates, since the examination discloses that the estates were opened and sufficient work completed to bar creditors' claims, settle wrongful death claims or clear property titles. Local custom does not demand formal closing, although most estates are fully administered.

[7] Uniform Probate Code Art. 3, General Comment.

[8] Miss. Code Ann. §§ 91-7-1 to -331 (1972).

[9] Uniform Probate Code §§ 3-1201, -1202.

30 days have elapsed since death; that no personal representative has been appointed nor application made for an appointment; and that the claiming successor is entitled to payment or delivery of the property. Transfer agents, debtors, and other persons acting pursuant to the affidavit are fully protected. The claimant securing property is liable for any misdelivery. The third person who relies on the affidavit is not. Further, the successor entitled to the property need not resort to probate procedures if the affidavit is not honored. A claimant may sue directly any person who dishonors the affidavit and refuses to transfer, pay, deliver, or issue personal property or the evidence thereof.

Regardless of the size of an estate, the UPC provides three basic probate procedures which are known as "informal proceedings," "formal proceedings," and "supervised administration." Informal proceedings[10] may be used only for the probate of a will or appointment of a personal representative. Formal proceedings[11] may be used for opening or closing an estate, or both, and for the resolution of any controversy arising during administration regardless of the form of opening or closing of the estate. Supervised proceedings[12] may be used where successors desire the entire administration of the personal representative to be subject to the continuing supervision of the court.

Informal proceedings for the probate of a will or the appointment of a personal representative are similar to Mississippi's probate in common form.[13] They are begun by filing a simple application with the court.[14] Notice need only be given to persons who have previously demanded notice of any filing in a particular estate and to any previously appointed personal representative whose appointment has not been terminated.[15] No judicial hearing is held. If a notice demandant or prior personal representative, after receiving notice, objects, formal proceedings must be held. A Registrar, who may be the judge or his appointee, examines the application and the records of the court. The application must contain information specified by the UPC which, if proved in a hearing, would unquestionably entitle the applicant to the order requested.[16] The Registrar may then issue an order of probate of the will or make an appointment of a personal representative if he finds that the statutory requirements have been met.[17]

---

[10] *Id.* §§ 3-301 to -311.

[11] UNIFORM PROBATE CODE §§ 3-401 to -414 embrace formal testacy and appointment proceedings. Other provisions throughout the Code also contemplate formal proceedings.

[12] *Id.* §§ 3-501 to -505.

[13] MISS. CODE ANN. §§ 91-7-3 to -13 (1972).

[14] UNIFORM PROBATE CODE § 3-301.

[15] *Id.* § 3-306.

[16] *Id.* §§ 3-303, -308.

[17] *Id.* §§ 3-302, -307.

The Registrar's action is ministerial rather than judicial. He is not compelled to grant an application which meets statutory requirements, but may deny any application without stating his reasons.[18] No appeal lies from his decision either denying or granting an application. Thus, a Registrar who senses a possible irregularity or dishonesty may deny an application without incurring personal liability. Informal proceedings are intended to provide a method for settling uncontested estates as simply and inexpensively as the administration of a revocable inter vivos trust. Hence, they are useful only where all parties concur in the use of informal proceedings. No purpose would be served by making the Registrar's duties mandatory or subjecting him to personal liability for refusal to grant an application. No harm can result from his action, because neither his affirmative or negative decision can prejudice the rights of interested parties who have a complete and effective remedy available—resort to formal proceedings.[19]

Formal proceedings[20] are adversary proceedings begun by filing a petition seeking an order of the court. All interested parties must be notified of the pendency of the proceedings, and are entitled to a judicial hearing. Formal proceedings may be used to determine any question arising during the administration of an estate. Thus, in formal proceedings wills may be probated, heirs may be determined, personal representatives may be appointed; and several means are provided for closing an estate. Interested parties may "come in and out" of court as they choose.[21] A will may be probated in formal proceedings, but the personal representative appointed in informal proceedings. An estate informally opened may be formally closed. A will informally probated may be formally construed. It is not necessary that there be an actual controversy between interested parties. It is enough that one or more of them desire the protection of a binding res judicata decree with respect to a particular issue.

The court's power in formal proceedings is limited to the issues presented in the petition to the court. The UPC confers no general power upon the court to intervene in the administration of an estate. The UPC does not prohibit nor attempt to restrict a court's inherent constitutional powers over its own procedures and officers. But the UPC does reject the concept of giving statutory powers to the court to supervise administration of estates, except to the extent requested by interested parties.[22]

---

[18] *Id.* §§ 3-305, -309.

[19] *Id.* § 3-305, Comment.

[20] *Id.* § 1-201 (15).

[21] Uniform Probate Code Art. 3, General Comment. In Wisconsin this is refered to as the "yo-yo" principle.

[22] *Id.*

If requested by the parties or ordered by the will, the court may order supervised administration. Such an order may be entered at any time.[23] Essentially, supervised administration requires that an estate be opened and closed in formal proceedings, and that the personal representative obtain authorization by an order of court prior to making any distribution of the assets of the estate. The court may also restrict the powers of a supervised personal representative. Such restrictions, to be effective against persons dealing in good faith with the personal representative, must be endorsed on the letters of appointment.[24] Unlike other personal representatives, the supervised personal representative remains under the continuing supervision of the court which may intervene sua sponte in the administration of the estate.[25]

Reasons why interested parties may request supervised administration will vary. At one extreme, bitterly hostile successors with sharply antagonistic property interests may distrust everyone, including the lawyers and the court. At the other extreme, very cooperative successors may choose supervised administration in the belief that their property may be more marketable—or perhaps, simply to add luster to the courthouse genealogy of their family. Or a testator may request supervised administration, and his wishes will be respected but are not binding upon the court. Hence, the exact scope of powers to be conferred upon the supervised representative should be tailored by the court to fit the interests of the successors.

If a personal representative has been appointed, the UPC also provides a "summary administrative procedure" to facilitate the distribution of small estates.[26] If it appears from the inventory and appraisal that the value of the entire estate, less liens and encumbrances, does not exceed homestead allowances, exempt property, family allowances, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative may immediately distribute the estate to the persons entitled to it without prior notice to creditors. Thereafter, he must file with the court a verified statement showing that he has complied with statutory requirements, that he has notified all creditors and claimants known to him, and that he has furnished a full account in writing to the distributees.

However, the court for cause shown may prohibit closing an estate by summary administrative procedure, and, if the court has previously ordered supervised administration, the supervised personal representative may not close an estate summarily.[27]

---

[23] *Id.* § 3-502.

[24] *Id.* § 3-504.

[25] *Id.* § 3-501.

[26] *Id.* §§ 3-1203, -1204.

To complement the Code's system of flexible administration, the Code confers extremely broad powers upon all personal representatives.[28] These powers resemble those conferred upon trustees by the Uniform Trustee's Powers Act.[29] The powers are those which should be included in a well drafted will by a testator who possesses every conceivable type of property and trusts his executor. A testator who does not wish his personal representatives to have such broad powers may request supervised administration of his estate and limitations upon the power of the personal representative.[30] Successors also may secure supervised administration and restrictions on the personal representative's powers.

The broad powers conferred upon personal representatives should speed up the administration of estates, eliminate expensive and purposeless probate paperwork, increase the value and marketability of property in the estate, avoid detrimental publication of the financial business of successors, and prevent tying up property indissolubly during the course of administration.

It is very questionable whether statutory restrictions have ever truly protected the estates of decedents and wards. In practice, chancery judges charged with supervising estates have relied heavily, if not completely, upon the integrity of the legal profession. Current charges against the legal profession have been directed against fees, not against misappropriation or mishandling of the probate estate.

The most significant and controversial features of the Code relate to the changes in administration procedures. There are many others, some of which will be discussed by this and later articles now in preparation. Guardianship procedures are clarified and increased powers given to conservators of a ward's estate.[31] Inter vivos transactions are made attractive for use as will substitutes.[32] Powers of attorneys have been expanded so that they may be effectively used as substitutes for guardianships.[33]

However, in view of the nationwide furor over the cost of probate, this article will first discuss the employment and compensation of lawyers under the Code. It will then discuss the effect of the Code on inter vivos transactions used as substitutes for wills and guardianships.

---

[27] *Id.* § 3-1204(a).

[28] *Id.* §§ 3-711, -715.

[29] MISS. CODE ANN. §§ 91-9-10 to -119 (1972).

[30] UNIFORM PROBATE CODE § 3-502.

[31] *Id.* Art. 5.

[32] *Id.* § 6-201.

[33] *Id.* § 5-501, -502.

II. LAWYERS' RESPONSIBILITIES AND COMPENSATION UNDER THE UPC

Nationwide, a bitter campaign is being waged for probate reform. The most bitter accusations directed at present probate practice complain that lawyers charge too much. Delay, complexities of administration, bond premiums, and court costs only incidentally fuel the Greek fire of burning criticism being poured over probate institutions. One Wisconsin critic has said: "We are really after the elimination of lawyers in all probate. That's the atrocity we want to destroy."[34]

Two systems have been proposed to replace present practices. The first, "free" probate, would require the state to perform all of the services necessary for transferring a decedent's property and computing death taxes. The second, "do-it-yourself" probate, would permit successors to probate the estate of their decedent. They could hire lawyers or nonlawyers, as they pleased. The theory is that competitive nonlawyer, estate-administering businesses, would keep legal fees low.

In Wisconsin, the probate critics believe they have triumphed and that "do-it-yourself" probate is now permissible. Although the last session of the Wisconsin legislature refused to enact statutes introduced to "abolish the lawyer monopoly on probate," it did provide[35] for informal administration of estates by procedures similar to the UPC provisions entitled "Informal Probate and Appointment Proceedings."[36] The Wisconsin statutes expressly provide that administrative action by the probate registrar is not action by the court.[37] Hence, the argument is made that preparation of an application for the probate of a will or an appointment of a personal representative does not constitute the practice of law, and, therefore, nonlawyers as well as lawyers may administer estates opened in informal proceedings. Since no further court proceedings are mandatory, the entire estate could be administered and distributed outside of court. All that would be needed would be sufficient certified copies of the letters of appointment to deliver to persons dealing with the personal representative.

In other states which have adopted the UPC, this argument has not been advanced. Probate work is treated as the performance of legal services.

If the Wisconsin probate reformers succeed in establishing "do-it-yourself" probate, either by judicial decision or statute, then Wisconsin seems destined to discover, by experience, what a careful study of legal history would reveal. Lay attempts to handle simple legal procedures often result in financial disaster. Lay charges for comparable services may exceed lawyers' fees. Often, this is because advertising laymen misrepresent lawyers' fees.[38]

---

[34] UNIFORM PROBATE CODE Note no. 5 (2) (1973).

[35] Ch. 39, [1973] Session Laws of Wisc. 1973-75 Biennial Session (WISC. LEGIS. SERV., 114 (1973)).

[36] UNIFORM PROBATE CODE Art. 3, Part 3.

[37] Ch. 39, § 865.01, [1973] Session Laws of Wisc. 1973-75 Biennial Session (WISC. LEGIS. SERV., 114 (1973)).

One wonders whether lawyers will gain or lose work. Lay mistakes produce lamentable problems compelling for their solution legal services much more expensive than those which would have been required had a lawyer been employed initially. Thus, the author recalls a widow who used a "Dacey form" to will her large estate to charity. Thinking, for a moment, about her wealthy sister, she wrote out a short sentence. It told sister that sister could use as much of the estate as sister wanted while sister lived. Sister did not need. Sister did not want. The IRS did.[39]

Farsighted lawyers may see in Wisconsin a precursor of similar activity in their own states. However, in Mississippi, there should be no controversy over legal fees. The chancellor is charged by law with the responsibility for fixing legal fees[40] and Mississippi statutes limit the compensation of an attorney to no more than a reasonable fee.[41] Furthermore, a Mississippi lawyer may not charge a double fee if he serves as both attorney and personal representative for the estate. He may be allowed a reasonable sum for his services as attorney in lieu of compensation as personal representative.[42] Even in states permitting a dual compensation, ethical lawyers charge only the legal fee, unless exceptional non-legal work is performed as personal representative.[43]

No minimum or maximum percentage limitation is placed upon the amount a Mississippi chancellor may allow for attorney fees. An executor's or administrator's compensation, however, may be no less than 1 percent nor more than 7 percent of the estate.[44] A guardian may be paid no more than 10 percent.[45]

The Code includes the employment and compensation of lawyers within provisions relating to the personal representative's broad powers to employ and compensate persons to advise or assist him in the performance of his administrative duties.[46] He may employ his own associates without being charged with conflict of interest. He may act upon their recommendations without making an independent investigation.

---

[38] R. DACEY, HOW TO AVOID PROBATE 6 (1965), suggests that lawyers charge from 10 percent to 20 percent of an estate.

[39] INT. REV. CODE OF 1954, §§ 2041, 2055.

[40] MISS. CODE ANN. § 91-7-281 (1972).

[41] *Id.* §§ 91-7-281, 93-13-79.

[42] *Id.* § 91-7-281.

[43] A.B.A. CANNONS OF PROFESSIONAL ETHICS 12 (1965).

[44] MISS. CODE ANN. § 91-7-299 (1972).

[45] *Id.* § 93-13-77.

[46] UNIFORM PROBATE CODE § 3-715 (21).

He may employ an agent to perform any act of administration, even if the act is one calling for the exercise of the personal representative's discretion. Mississippi does not permit a personal representative to delegate the exercise of his discretion to an agent or attorney.[47]

The Code standard for compensating employees of a personal representative[48] is similar to the standard employed in Mississippi for compensating attorneys.[49] No more than a reasonable sum may be paid and no percentage minimum or maximum limitation is imposed.

A primary difference between Mississippi law and the UPC is that the Code provides that the personal representative need not obtain prior court approval to fix his own fee and that of the estate attorney. However, any interested person may petition the court for a review of the propriety of employment or the reasonableness of any compensation determined by the personal representative.[50] Any person receiving excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

The reason for the grant of these and other broad powers to any personal representative, whether the decedent died testate or intestate, is to expedite administration and to assure the validity of transactions conducted by agents. Therefore, property can be more easily transferred or disposed of and the value of the property to prospective purchasers will be greater. Personal business is not publicly exposed to rapacious competitors. Far from protecting an estate, rules requiring court approval of transactions have produced the phrase: "You can get it for a bargain. It's in an estate." Generally, the court approval is only perfunctory routine.

Contrary to Mississippi, the Code has nothing to say with respect to whether a personal representative who also serves as attorney may receive compensation in both capacities.[51] Presumably, it would not be reasonable for the attorney to be paid a double fee, merely because he signs, as personal representative, papers which he has prepared as a lawyer. It would be reasonable and necessary to charge an appropriate fee for services rendered solely in the capacity of personal representative.

Although not mandated by statute, fee schedules in Mississippi formerly based normal compensation upon percentage limitations.[52]

---

[47] McWilliams v. Brown's Estate, 183 So. 2d 82 (Miss. 1966).

[48] UNIFORM PROBATE CODE § 3-721.

[49] MISS. CODE ANN. § 91-7-281 (1972).

[50] UNIFORM PROBATE CODE § 3-721.

[51] *See* text at note 39 *supra*.

[52] Fee Computations and Suggested Minimum Schedule, Mississippi 1967. These schedules have been abolished since the decision in Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973).

These charges were approved by chancellors. The UPC in no way dictates what measure the bar and bench shall use to determine the reasonableness of a lawyer's compensation. Percentage fees are often justifiable because they reflect the greater responsibility assumed in larger estates. Further, they reflect that larger estates include more types of property requiring different types of transfers. They reflect also that lawyers frequently render services for which they are not adequately compensated. Profitable work must always bear an appropriate portion of a lawyer's overhead.

On the other hand, it is ridiculous to charge 1 percent of the value of real estate for the preparation of a simple deed. Under the UPC, real estate may be sold without a court order. A good faith purchaser may rely solely upon the letters of appointment of the personal representative.[53] A buyer is not charged with a duty to inquire, to examine the will or probate proceedings, or to see to the application of the purchase money. Hence, whether or not there is a will, the personal representative can quickly and easily dispose of real estate.

The rights of heirs and devisees are transferred from the real estate to the proceeds of sale in the hands of the personal representative.[54] They may not recover the real estate from the purchaser if the personal representative absconds. So long as responsible lawyers are handling an estate, the risk of loss to an estate is extremely remote.

Overall, lawyers will not lose fees if the Code is adopted. Any work loss will be a loss of unnecessary work. The leaders of our profession have drafted the Code to make administration as safe and easy as possible. It has been drafted for the benefit of the public, and not for the benefit of lawyers. To a limited extent, it might be easier for laymen to probate an estate under the Code than under present statutes, but the Code has not been drafted for the purpose of establishing lay, estate-administering businesses. How could anyone be expected to draft a system which laymen could understand sufficiently so that they could handle all of the conceivable types of people, all of the conceivable types of property, and all of the conceivable resulting relations? How could laymen anticipate and so prevent or guard against the bitter personal disputes that sometimes arise in probate?

---

[53] UNIFORM PROBATE CODE § 3-714.

[54] *Id.* § 3-712. In addition, section 3-607 permits interested parties to secure an order restraining a personal representative from committing a breach of fiduciary duty. Section 3-611 permits a petition for an order removing the personal representative.

III. USE OF POWERS OF ATTORNEY FACILITATED

A. *Durable Powers of Appointment*

Persons deteriorate in variable ways during the aging process—retirement, senility, moribundity, and finally, the repose of death. At some point of time, decadence results in the loss of legal competency. Then, the words and acts of an elderly person no longer legally bind him.[55] A conservator may then be appointed for him.[56] However, the expense, publicity, and legal limitations inherent in guardianship generally cause estate planners to prefer to create an intervivos trust. By means of a trust, triggered into operation by the disability of the settlor, the disadvantages of guardianship may be avoided. A trustee may administer trust property far less expensively and much more efficiently than a guardian or conservator.

There are also objections to the creation of a trust. A settlor may not wish to surrender even the minimal interest in his property required to be conveyed in order to establish a trust. The cost of trust administration may be disproportionate to the size of the estate. Modest estates usually consist of properties not easily handled by a trustee. Co-owners of business or other properties may object to intervention or supervision by a trustee.

Any trustee, particularly a professional one, may find it difficult to render or supervise personal services required for the care of the incompetent and for the maintenance of his home. A trust would have to be drafted carefully to reduce the burden of accounting for recurring expenditures for food, clothing, medicines, and other supplies.

The UPC provides an attractive third option for use in estate planning, patterned after a Virginia statute.[57] A person may anticipate his own legal disability by granting a "durable" power of attorney to a trusted relative or friend.[58] The power is called "durable" because it remains fully effective notwithstanding the disability of the grantor. The power need not be exercisable prior to such disability. The grant may be so worded that the power does not become effective at all unless and until the grantor does become disabled. Such a power validates all acts of the attorney-in-fact performed for the principal during his disability. It also remains effective during any period of uncertainty as to whether the principal is dead or alive.[59]

Because of the possibility of abuse of the power during the principal's incompetency, the Code provides that a duly appointed conservator may suspend, revoke or terminate all or any part of the power of attorney or agency. Unless a conservator does so act, the power of the attorney-in-fact is not affected by the appointment of a guardian or conservator. The attorney-in-fact may continue to exercise all of the powers granted to him. However, he must account for his actions to the conservator rather than to the principal.[60]

---

[55] Hill v. McLaurin, 28 Miss. 288 (1854).

[56] MISS. CODE ANN. § 93-13-251 (1972).

[57] VA. CODE ANN. § 11-9-1 (1950).

[58] UNIFORM PROBATE CODE § 5-501.

[59] *Id.* § 5-502.

In many rural areas, the power of attorney is extensively used. Local businesses and institutions honor the power although they are aware of the donor's disability. Occasionally, the power is even erroneously used after the principal's death to settle the estate.

The Virginia statute from which the UPC provision was copied did not expressly permit the creation of a power to be exercisable only after the grantor became disabled. However, Virginia attorneys accomplished the same result by a delivery in escrow.[61] The grantor would deliver the power of attorney to an escrow agent to hold until such time as the grantor should become disabled. The escrow agent would deliver the power to the designated attorney upon receipt of a statement from a physician certifying that the grantor had become legally incompetent. The UPC makes delivery in escrow unnecessary.

Mississippi has no legislation comparable to the durable power of attorney. A recorded power of attorney remains in force until revoked in writing or by death.[62] Nothing is said about the principal's disability. It could be argued that, since disability is not included as an event which revokes the agency, the power remains in effect notwithstanding such disability. However, it appears more reasonable to assume that the statute is only intended to protect third persons dealing with the agent—not to empower an agent to continue exercising agency powers after his principal has become disabled.

B. *Effect of Death or Disability Upon Other Powers*

Other powers, not expressly created to continue despite disability, will be revoked by the principal's disability. Death, of course, revokes all agency powers, unless for other reasons the power is irrevocable.[63]

Action may be taken in ignorance of the principal's death or disability. The durable power is made effective "during any period of uncertainty as to whether the principal is dead or alive."[64] If the power is nondurable, the UPC protects actions taken in good faith by persons unaware that the principal has previously died or become disabled or incompetent. It is somewhat similar to present Mississippi legislation which protects good faith action by parties unaware of the principal's death;[65] but which is silent with respect to his disability.

---

[60] *Id.* § 5-501, Comment.

[61] Word, *Updating Virginia's Probate Law*, 4 U. RICHMOND L. REV. 223,236 (1970).

[62] MISS. CODE ANN. § 87-3-13 (1972).

[63] Clayton v. Merett, 52 Miss. 353 (1876); RESTATEMENT (SECOND) OF AGENCY § 121 (1957).

[64] UNIFORM PROBATE CODE § 5-501.

Under the UPC, action by persons unaware of the death, disability or incompetence of the principal may nevertheless bind the principal and his heirs, devisees, and personal representatives.[66] The power of attorney must have been executed in writing and the person asserting the validity of the action must have acted in good faith under the power. He must not have had *actual*, as distinguished from constructive, notice of the terminating event.

Comparable Mississippi legislation deals with the death,[67] but not the disability, of a principal who has created a power of attorney. The Mississippi statute applies whether the power has been created orally or in writing. It applies only to persons dealing with the agent, and not to the agent himself. The person must have acted in good faith; however, not only must he have no actual knowledge of the death of the principal, but he must also show that surrounding circumstances repel any imputation of fraud or negligence. The Mississippi statute does not affirmatively state that the action taken is binding upon the principal and others. It merely provides negatively that the power is not revoked as to such person.

Mississippi also provides that any letters of attorney, intended to be used in Mississippi, may be recorded if acknowledged or proved in the same manner as a conveyance of land.[68] If a power is so recorded, it continues in effect until revoked "in writing or by death."[69] Should the Mississippi statute be construed to mean that such a recorded power is not affected by the disability of the principal? Must the written revocation of the power be recorded or otherwise brought to the attention of the third person? Does "without notice" mean without *actual* knowledge; or should "notice" be construed to require that surrounding circumstances repel any imputation of fraud or negligence? The statute has not been judicially construed. Hence, these and other questions remain unanswered.

Present Mississippi legislation is incorporated under Title 87 of the 1972 Code relating to Contracts and Contractual Relations and is primarily concerned with facilitating the exercise and use of powers of attorney in business and commerce. Provisions relating to revocation are of secondary importance. In contrast, the UPC provisions are included with legislation concerned solely with the affairs of disabled and incompetent persons. Hence, it might be desirable simply to amend the power-of-attorney sections of the present Mississippi Code to make possible the creation of durable powers of attorney.

---

[65] MISS. CODE ANN. § 87-3-15 (1972).

[66] UNIFORM PROBATE CODE § 5-502 (a).

[67] MISS. CODE ANN. § 87-3-15 (1972).

[68] *Id.* § 87-3-3.

[69] *Id.* § 87-3-13.

Whether Mississippi does or does not adopt the Code, it appears desirable that existing legislation be amended to clarify the effect of legal disability upon a recorded power. Also, amendments are needed to clarify and make uniform the requirements with respect to notice of disability or death.

C. *Proof of an Agent's Lack of Actual Knowledge of the Principal's Death, Disability, or Incompetence*

The UPC has also borrowed from Virginia[70] a simple and unique method for proving that an attorney-in-fact or agent did not have actual knowledge of the death, disability, or incompetence of the principal for whom he acted.[71] An affidavit, executed by the attorney-in-fact or agent, in the absence of fraud, is made conclusive proof that the power was not revoked or terminated. If the exercise of the power required the recording of a written instrument, the affidavit also may be recorded in the same manner.

The initial reaction to this provision is one of shock. It appears to be a boot-strap self elevation—a self-serving declaration, not subject to cross-examination, made incontrovertible. However, there are safeguards. If the statement is false, the affiant may be convicted for his perjury. If there is fraud, the transaction may be invalidated on that ground.

Considerations of perjury or fraud alone, however, would not justify the broad sweep of the statute. Overall, the draftsmen must have concluded that the need for protection for bona fide transactions far outweighs the hypothetical policy which undergirded the common law rule that death or disability automatically revokes agency powers. Strong reasons can be advanced for the statute.

If the attacked transaction is personal to the principal, a basic assumption of the parties would have been that the principal was alive. Either party could avoid the transaction because it would be impossible to perform the obligation of the principal. His representatives would be excused by impossibility, and failure of consideration would excuse the other party. If the transaction is not personal to the principal, it is difficult to imagine any reason for avoiding the transaction other than to escape from a bad bargain or to be able to bargain for a better one.

---

[70] VA. CODE ANN. § 11-9-2 (1950).

[71] UNIFORM PROBATE CODE § 5-502(b).

Since the principal reposed confidence in the agent, it is probable that his interests would be best served by validating the transaction. Adverse parties should not be entitled to escape without showing actual prejudice to their interests directly resulting from the death, disability, or incompetence of the principal. And since the principal initially gave authority to his attorney, it would seem even more unjust for his conservator or successors to assert a technical claim that the power had been terminated. They, too, should show actual prejudice directly related to the terminating event asserted.

It thus appears that there is a two-fold purpose for giving conclusive effect to an affidavit asserting lack of knowledge, in the absence of fraud. First, it facilitates performance of contracts and preserves the fruits of executed transactions. Parties to the action are protected with respect to all future transactions dependent thereon. The protection is immediate upon the execution of the affidavit. The protection is needed most where all interested parties wish the action to be effective.

Second, a means is provided for immediate protection of bona fide purchasers. This is particularly true with respect to recorded land transactions. A clear title cannot be conveyed where probate records show death or disability of the principal prior to the date of the questioned transaction. Making the affidavit conclusive clears the record title, and protects bona fide purchasers.

Nevertheless, a question remains. What is meant by the phrase: "in the absence of fraud?" If the agent makes a false affidavit, is there fraud? Suppose his only purpose is to validate action for the benefit of all parties? Suppose his only purpose is to protect his principal's widow and children? Does the UPC legalize a "white lie?"

Mississippi has no similar legislation.

IV. MULTIPLE-PARTY ACCOUNTS IN FINANCIAL INSTITUTIONS

A. *Sources and Background of Code Provisions*

Bank accounts lend themselves readily to use as a substitute for wills, guardianships, or powers of attorney. If a person is disabled, he and a trusted friend may sign signature cards permitting the friend to use the account for the benefit of the depositor. At death, a simple bookkeeping entry can vest the account in a survivor. To support the transfer, the bank needs only a certified copy of the death certificate and a release of the account, which are easily obtained in jurisdictions imposing death taxes. Unnecessary expenses and delay of probate administration are eliminated.

Such accounts satisfy various needs. A depositor may wish to retain full and complete control over the account, but have it payable to designated persons at his death. He may wish to permit an agent to use the account during his lifetime only for his benefit, and to have any balance remaining at his death go, at least in part, to others. He may wish to share an account with a co-depositor so that, although the survivor will take the entire account at death, each is only entitled to a pro rata share during their joint lives. Co-depositors may wish to share the fund equally despite the fact that their contributions to the fund are unequal.

An obstacle to so using deposit accounts has been the rule that property dispositions intended to take effect at death must be closely scrutinized to determine whether the transaction is testamentary or nontestamentary. If testamentary, the transaction is invalid unless the decedent has expressed his testamentary intent in an instrument executed with the formalities required by statutes of wills. If nontestamentary, the transaction is invalid unless the decedent has conveyed to or created in the recipient, prior to death, some form of "interest" recognized by law. The rules have been rigidly applied; but examination of the myriad cases reveals, not fraud prevented, but rather the undisputable intent of the decedent defeated—often to the joy of undeserving, and sometimes "laughing" heirs.

Ultimately, three forms of survivorship accounts have been established which are held valid as nontestamentary. Under theories of contract, property, or trust, depositors have succeeded in their attempts to use accounts as will substitutes. A bank's obligation is extinguished by paying, pursuant to contract, a third party beneficiary designated as the recipient at death. Under property theories, a bank may pay the balance to a surviving joint tenant. Under trust theories, the bank may pay the balance to the surviving beneficiaries.

Overall, each theory has merit. Trusts, if revocable, work well as will substitutes. The beneficiaries are entitled only to the balance remaining in the account at the death of the depositor. Property concepts work well to preserve the pro rata share of co-depositors. Contract concepts work well as a means for handling funds belonging beneficially to a person who wishes a third party beneficiary to take at death.

All of them have defects. Under property and contract theories, the form of signature card used permits any signer to withdraw all or any part of the account. A beneficiary or agent may abscond with the entire account, before or after the depositor's death.

Trust theories work satisfactorily as will substitutes in jurisdictions which follow the tentative trust doctrine.[72] Even if there is no contemporary evidence of the depositor's intent, he is deemed to have established a revocable trust by depositing funds in his name as trustee for others. At his death, the surviving beneficiaries take the balance. However, where that doctrine is not followed, additional evidence is required to establish a true trust. Unless a true trust is established, the named beneficiaries take nothing; but, if a trust is established, the depositor may lose all further rights to use the trust for his own benefit.

---

[72] 1 A. Scott, Trusts § 58.2 (3d ed. 1967).

Both trust and property concepts may result in undesirable gift and tax consequences.[73] Further, the form of such accounts provides little help for determining the rights of the parties during the lifetime of the depositor. Generally, no problems arise where all parties are trustworthy. If such a problem does arise, evidence is required to show the intention of the depositor. This generally has to be inferred from circumstances because depositors often fail to express any intent.

None of the theories protects the financial institution. It risks double liability if it pays in accordance with its own view of the rights of the parties. If it fails to pay, no quick method is available to determine the rights of competing claimants. This defect is now cured by statutes passed essentially for the purpose of permitting banks or savings and loan associations to pay survivors designated on the account, without further liability to anyone.[74] These are not particularly satisfactory for resolving the rights of parties and survivors *inter sese.*

In some states, statutes permit a payable-on-death account.[75] The depositor retains full control of the deposit account during his life; and the bank may pay the balance remaining at his death to persons he has designated. The statutes confer the beneficial interest upon surviving payable-on-death beneficiaries. One wonders why we lawyers take so long to arrive at such simple solutions.

Experience under the various legal concepts and statutes clearly demonstrates that bank accounts are *sui generis*, specialized transactions requiring special legislation. A depositor should be able to retain full control over an account during his life, and designate beneficiaries who shall take at his death. He should be able to share the account with co-depositors, with or without survivorship provisions. He should be able to permit another to use the deposit for his benefit, with or without survivorship provisions. Although he should take the risk of a wrongful withdrawal by one acting pursuant to his authority, neither he nor his successors should be prejudiced by the form of the account in an action against the wrongdoer.

A financial institution should be able to pay promptly according to the terms of the account without further liability to anyone else. Mere notice of a dispute should not preclude the bank from so paying, unless the notice complies with definite legal requirements.

---

[73] *Cf.* Bishop v. United States, 338 F. Supp. 1336 (N.D. Miss. 1970).

[74] *E.g.*, MISS. CODE ANN. §§ 81-5-63, -11-61 (1972).

[75] *See, e.g.*, OHIO REV. CODE §§ 2131.10 to .11 (Supp. 1972).

To accomplish these goals, the Code establishes three forms of multiple-party accounts, clearly defines the rights of living and surviving persons in such accounts, and protects a financial institution which makes payment according to the terms of such accounts irrespective of whether such payment accords with the beneficial interests of the parties to the account.[76]

The three forms of multiple-party accounts are the joint account, the payable-on-death account, and the trust (not a true inter vivos trust) account. None is the equivalent of the Mississippi joint-tenancy account commonly used pursuant to the provisions of the banking and savings and loan association statutes.[77] For lawyers familiar with the disastrous gift and estate tax consequences resulting from ill-advised placing of property in joint tenancy,[78] the Code multiple-party accounts will be a welcome addition to their estate-planning arsenal.

Banks and other financial institutions should welcome these accounts as a means for increasing service for their customers. The Code's protection for financial institutions is as comprehensive as present statutes.[79]

B. Joint Accounts under the UPC

The "joint" account is one payable on request to one or more of two or more parties, whether or not mention is made of any right of survivorship.[80] It belongs to the parties, during their lifetime in proportion to their net contributions, unless there is clear and convincing evidence of a different intent.[81] The term "net contributions" means, at any given time, the sum of a party's deposits, less his withdrawals not made for the benefit of another party, plus a pro rata share of interest or dividends.[82] If dead, the party's net contribution would also include life insurance proceeds added to the account by reason of his death.[83]

At the death of a party to a joint account, it is presumed that the balance remaining on deposit belongs to the survivor or survivors.[84] However, this yields to proof, by clear and convincing evidence, that the parties, at the time the account was created, intended otherwise. The share of the decedent is not divided among the survivors according to their proportionate interest in the account immediately prior to the death. Instead, it is divided equally among the survivors.[85] The right of survivorship continues between the surviving parties to the account.[86]

---

[76] UNIFORM PROBATE CODE §§ 6-101 to -113.

[77] MISS. CODE ANN. §§ 81-5-63, -11-61 (1972).

[78] Bishop v. United States, 338 F. Supp. 1336 (N.D. Miss. 1970).

[79] UNIFORM PROBATE CODE §§ 6-108, -113.

[80] *Id.* § 6-101 (4).

[81] *Id.* § 6-103 (a).

[82] *Id.* § 6-101 (b).

[83] *Id.* § 6-101 (13).

[84] *Id.* § 6-104 (a).

The joint account is suitable for use by related parties, such as husbands and wives. Either may draw upon the account at any time. Both may contribute to it. At death, the survivor will take the entire account. However, the survivor will escape paying death taxes on any portion of the balance attributable to his or her contributions to the account.[87]

The lifetime consequences are important also. In the event of marital discord, parties can establish their respective property interests in the fund. Lawyers negotiating marital settlements and courts dividing marital property need to know the respective property rights of the parties as of the time of separation. With this knowledge lawyers may not be so prone to trot the divorce client to the bank to withdraw a joint account.

So also, the form of the joint account, particulaly a savings account, will show that the depositor did not intend a taxable inter vivos gift.

However, the definition of a joint account is broad enough to include co-depositors who do not intend to create a survivorship account. Even though a contrary intent could be established, the risk of delay and litigation exists. The Official Comment following section 6-104 of the UPC suggests that the effective date of the Code be postponed so that banks may notify their customers of the desirability of reviewing their accounts. Perhaps, it would be wise for the banks to establish some form of joint deposit account which is not a multiple-party account under the Code.

C. *The Payable-on-Death Account under the UPC*

A "P.O.D. account" means an account payable on request to one person (known as an original party or payee) and on his death to one or more P.O.D. payees.[88] A "P.O.D. payee" means a person designated on a P.O.D. account as one to whom the account is payable on request after the death of one or more persons.[89] Such an account may also be payable on request to two or more original payees during their lifetime, and after the death of all of them, to one or more P.O.D. payees.

---

[85] *Id.*

[86] *Id.*

[87] INT. REV. CODE of 1954, § 2040.

[88] UNIFORM PROBATE CODE § 6-101 (10).

[89] *Id.* § 6-101 (11).

A P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees. If two or more parties are named as original payees, their rights, during their lifetimes, are the same as the rights of the parties to a joint account. Each is entitled to a share of the account proportionate to his net contribution.[90]

P.O.D. payees have no interest in the account so long as any original payee remains alive at the death of the original payee, or the survivor of original payees, the account belongs to the surviving P.O.D. payee or payees. Co-P.O.D. payees are entitled to equal shares of the account.[91]

P.O.D. payees must survive the original payees. Successors to a deceased P.O.D. beneficiary take nothing.[92] Hence, it might be wise to add language to a P.O.D. designation indicating that the share of a deceased beneficiary should go to his estate.

The Code provides that there shall be no survivorship between surviving P.O.D. payees unless the terms of the account or deposit agreement expressly so provide.[93] Since the surviving P.O.D. payees did not establish the account, survivorship should not be forced upon them. It is more likely that they would prefer their own family to take, rather than a co-payee. As the owner of the account, an original payee may withdraw the account during his lifetime, change the P.O.D. designation, or cancel it at any time. No interest of any kind passes to the P.O.D. payee until the depositor dies.[94]

Such an account, under present laws would be testamentary in nature. The original payee intends that the transfer shall be effective only at his death. He may revoke it at anytime. Therefore, it would not be effective unless established in compliance with formalities required by the statutes of wills.

For financial institutions to attempt to establish deposit accounts valid also as wills would be absurd. The problems that would occur are myriad. A deposit-account contract could not be probated and kept in the permanent files of chancery court. Preparation of wills is the practice of law beyond the scope of banking business authorized by regulatory statutes. There would be no correlation between the account and any wills executed by the testator. Complicated questions of revocation and dual administration would arise.

May, then, such an account serve the same purpose as a will despite the lack of safeguards inherent in the preparation of a valid will?

---

[90] *Id.* § 6-103 (a).

[91] *Id.* § 6-104 (b).

[92] *Id.*

[93] *Id.*

[94] *Id.*

Statutes of wills should assure that a legally infallible method exists whereby a person may be certain that his property shall pass at his death in accordance with his express intention, without affecting in any way his complete control over his property during his lifetime. Details may vary, so long as lawyers are able to advise a client that compliance with statutory requirements will assure the admission of his will to probate and the disposition of his property as therein directed.

Statutes of wills also assure that the testator's intention may be proved, after his death, by trustworthy written and oral evidence. The ceremonies impress upon the minds of testator and witnesses that the transaction is solemn and important, that it will have legal consequences after death, and that the original will must be permanently recorded in an appropriate court. Not only fraud, but also happenstance and idle statements or writings are discouraged. The courts are assured they will not be burdened with resultant litigation which might easily have been prevented had a decedent consulted a lawyer or followed the law.

All of these purposes served by the statute of wills may be as effectively served by P.O.D. accounts. In fact, because the method is adapted specifically to a particular type of property, a P.O.D. account serves the purposes of the owner far better than a will with respect to that specific property.

Lawyers can assure a client that the P.O.D. account will pass, at death, according to his wishes. The method of transfer will be quicker, cheaper, and more conclusive than a probate transfer. His intention may be proved by evidence perhaps more trustworthy than a valid will. From the moment of its inception, the evidence will be preserved in the business records of a carefully regulated public institution. Those records would disclose a series of transactions executed by the decedent all consistent with the form of the account. His own personal records, if he has preserved them, will be corroborative. The Internal Revenue Service might have yearly statements of interest paid out of the account. Officers and employees of the financial institution would verify the absence of fraud, mistake, or other invalidating circumstances.

Those approaching death gain added peace of mind and assurance if they know their property will be distributed in accordance with their wishes. Wills lie drawing dust in drawers or boxes, too much of a foreboding reminder of mortality than a source of comfort. The lawyer who drew the will is seldom a friend and companion. He may be only faintly remembered if he drafted the will long before death. The lawyer, like the will, is associated with death and has little, if any, opportunity to serve the client's twilight needs. Lawyers lack the knowledge of the dynamics of dying required to serve in such a role.

The officers of a financial institution may serve, as no lawyer can, the lifetime needs of their depositors. Their relationship to the decedent will have been personal, not institutional. They are trusted and respected. All of their association with depositors will be about the business of living. Death once mentioned, at the time the account is made P.O.D., will thereafter be forgotten. But the depositor will know, without morbidity and with the greatest of confidence, that friends—not unknown persons in a political structure—will swiftly and in confidence transfer the account no longer needed.

The P.O.D. account may also be effective as a substitute for guardianship. A legally competent, but otherwise disabled, depositor might authorize an agent to make withdrawals for the depositor's benefit. Financial institutions require all depositors to sign signature cards. If the account is a time or savings deposit, not represented by a certificate, the financial institution may also require presentation of the account passbook. The depositor's signature constitutes his acceptance of the terms of the account contract. It also authorizes the institution to honor checks or withdrawal orders signed by the persons whose signatures appear on the card. The depositor may, in addition, authorize the financial institution to honor the signature of his agent. A simple form suffices: "*D* (depositor), by *A* (agent)."

The depositor may also provide that the agent's authority to make withdrawals shall continue notwithstanding the depositor's disability. He may do this by giving to the bank an executed copy of a durable power of appointment of the agent which will remain effective notwithstanding the depositor's subsequent disability. Thus, by combining the P.O.D. account with a durable power of appointment, a depositor may create a very inexpensive substitute for both a will and a guardianship.

If the depositors are husband and wife, a combination of the features of the joint account and the P.O.D. account may be desirable. During their lives together, both may use the account. In the absence of clear and convincing evidence to the contrary, they will each own a share of the account proportionate to their net contributions. At the death of one, the other becomes entitled to the account. When the survivor dies, the account may pass in equal shares to their children as P.O.D. payees.

In using the terms "will substitute" and "guardianship or conservator substitute," the author does not mean to imply that bank accounts will always be advisable nor that a will is unnecessary or undesirable. A depositor should consult a lawyer before establishing any plan for the care and disposition of his property in the event of his disability or death. Financial institutions should not be permitted to suggest that use of their facilities saves the expense of a lawyer's services. To the author's personal knowledge, all reputable financial institutions do recommend to patrons that they consult a lawyer of their own choice.

D. Trust Accounts under the UPC

A "trust account" is defined as "an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account."[95]

The Code trust account "does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney-client."[96] The trust account "belongs beneficially to the trustee during his lifetime. If two or more persons are named as trustees their rights are the same as parties to a joint account. Each is entitled to a share of the account in proportion to his net contributions."[97]

At the death of the trustee, or of the survivor of one or more trustees, the balance of the account belongs to the surviving beneficiaries.[98] Thus, if husband and wife establish a trust account naming their children as beneficiaries, each of the children must survive both parents in order to be entitled to a share of the account. If the parents desire grandchildren to take the share of a deceased child, the designation of beneficiaries should include a deceased child's estate.

There is no right of survivorship among surviving beneficiaries, unless the terms of the account or deposit expressly provide for survivorship between beneficiaries.[99] These persons normally will have had no control over the form of the account,[100] and presumably would prefer to name a person other than a surviving beneficiary to take their shares.

Thus, a trust account is not a true trust. It is patterned after the Totten or tentative trust. In states which recognize tentative trusts, such accounts are used to obtain increased insurance coverage, to transfer the account at death, and to conceal the real wealth of a person. The tentative trust, however, may not be used for the purpose of defeating creditors. The proceeds of the account may be reached by creditors before and after the death of the depositor.[101]

---

[95] *Id.* § 6-101 (14).

[96] *Id.*

[97] *Id.* § 6-103 (c).

[98] *Id.* § 6-104 (c).

[99] *Id.*

[100] *Id.* § 6-104, Comment.

[101] 1 A. SCOTT, TRUSTS § 58.5 (3d ed. 1967).

Mississippi does not follow the tentative trust doctrine. Some evidence of the depositor's intent to create a trust must be found in addition to the form of the account.[102] If the circumstances show that the depositor intended a trust, whatever the form of his language, the designated beneficiaries are entitled to the balance remaining in the account when the depositor dies. The personal representative of the deceased beneficiary may not recover the proceeds for the benefit of the decedent's creditors or successors.[103]

In a highly mobile society, a useful purpose would be served by Mississippi's adopting the trust account in order to make its legislation uniform with other states. Apart from the interests of uniformity, however, no study exists showing a public demand for legislation authorizing trust accounts. It is difficult to discern any appreciable difference between the UPC trust account and a UPC account combining both the features of a joint account and a P.O.D. account.

E. Features Common to Multiple-Party Accounts

1. Termination or Modification under the UPC

A multiple-party account may be changed, after it is established, only by a written order or request.[104] The order or request must be signed by a party entitled to request immediate payment. It must be received by the bank during the party's lifetime, and must not have been countermanded by any other written order or request of the same party during his lifetime. The order or request may change the form of the account or stop or vary payment according to the terms of the account.

The status of the account at the time of the death of a party determines whether rights of survivorship attach to the account.[105] Unless it is at that time a multiple-party account as defined in the Code, the only effect of death is to transfer the rights of the decedent as part of his estate.

2. Transfers at Death are Nontestamentary

Transfers at death, pursuant to the terms of multiple-party accounts, are not to be considered testamentary.[106] Such transfers are effective by reason of the account contracts involved and the Code. The Code requirements with respect to the execution and probate of wills are inapplicable. This eliminates a basic weakness of present statutes under which it is sometimes possible for the personal representative to recover a bank deposit from a survivor, not because the decedent did not wish the survivor to take the account, but because the account was not duly signed and attested as a will.[107]

---

[102] Ladner v. Ladner, 128 Miss. 75, 90 So. 593 (1921).

[103] *Id.*

[104] UNIFORM PROBATE CODE § 6-105.

[105] *Id.*

[106] *Id.* § 6-106.

Under present Mississippi law, an attempt to create any account similar to the form of UPC in multiple-party accounts would probably be invalid as an attempted testamentary disposition. To be valid as a trust Mississippi law requires that there must be evidence other than the mere form of the account.[108] If such evidence exists, under the Code such an account would be a true trust and not the Code multiple-party trust account.[109] To be valid as a joint tenancy, Mississippi law requires evidence showing that a depositor intended to donate a present interest in the account to the survivor. This evidence may be found in the form of an account permitting either party to withdraw the account and providing that the survivor is entitled to the entire account.[110] In contrast, the Code provides that, in the absence of evidence, each party is entitled to his net contributions to the deposit.[111] Thus, the Code joint account does not establish a true joint tenancy according to property concepts. Accordingly, it might be attacked in Mississippi as testamentary. The P.O.D. account would clearly be a testamentary disposition under present Mississippi law. No interest passes to the P.O.D. payee until death.

Even if Mississippi does not adopt the Code, it might be wise to provide that survivorship accounts need not be executed with the formalities required of a will.

3. Rights of Survivorship May Not Be Changed By Will

The Code language is flexible. By express terms, an account may create a right of survivorship other than those inherent in the Code's three forms of multiple-party accounts.[112] Whether the express terms of the account or the provisions of the Code establish a right of survivorship, a party may not, by a subsequent will, change such right of survivorship.[113] Neither may the party, by subsequent will, change a beneficiary designation in a trust account or a P.O.D. payee designation.

---

[107] Leverette v. Ainsworth, 199 Miss. 652, 23 So. 2d 798 (1945); Smith v. Taylor, 183 Miss. 542, 184 So. 423 (1938); Meyer v. Meyer, 106 Miss. 638, 64 So. 420 (1913).

[108] Ladner v. Ladner, 128 Miss. 75, 90 So. 593 (1921).

[109] UNIFORM PROBATE CODE § 6-601 (14).

[110] Leverette v. Ainsworth, 199 Miss. 652, 23 So. 2d 798 (1945).

[111] UNIFORM PROBATE CODE § 6-103 (a).

[112] *Id.* § 6-104 (e).

[113] *Id.*

Hence, the survivor may be paid promptly by the financial institution. There need be no delay pending probate of a known will or search for an unknown one. The financial institution is protected against conflicting claimants quarreling over the interpretation of ambiguous language in a will. The testator is protected from inadvertent revocation of the survivorship features of his multiple-party account.

This is similar to Mississippi law respecting accounts in joint tenancy or revocable trusts. Under Mississippi law, joint tenancy or revocable trust account proceeds become the property of the surviving joint tenant or trust beneficiary immediately upon the death of the depositor.[114] Personal representatives may not recover the account proceeds for the purposes of administration. Decedent's creditors may not reach the proceeds for the purpose of satisfying their claims. This is consistent with the theory that a deceased joint tenant or trust settlor has a property interest subject to being divested by his predeceasing the other joint tenants or life beneficiaries. Therefore, nothing is left to be disposed of by will.

4. Survivor Rights Subordinate to Rights of Family and Creditors

The Code permits the personal representative to recover the proceeds of multiple-party accounts to the extent necessary to pay debts, taxes, and statutory family allowances.[115] Statutory allowances under the Code include a homestead allowance of $5,000 in real or personal property, exempt property in the amount of $3,500, and a family allowance for support during the period of administration.[116] The authors of the Code believe that the decedent should not be permitted to deprive minor children of property needed for their support.[117] Also, the Code follows the old phrase found often in the fraudulent conveyance cases: "A man should be just to his creditors before he is generous to his friends."

The Mississippi law is contrary. The rights of surviving joint tenants and of trust remaindermen are superior to claims payable from the decedent's estate.[118]

In *Ladner v. Ladner*,[119] oral evidence from a bank official established that the depositor intended to retain the right to withdraw the deposit during his lifetime, but that at his death it should go to children named as alternate owners of the account. The court construed the transaction as an inter vivos revocable trust. At the death of the decedent, the children took as surviving remaindermen to the exclusion of the decedent's estate. The court gave no reasons for its decision other than that an owner may do as he pleases with his property.

---

[114] Miss. Code Ann. §§ 81-5-63, -11-61 (1972).

[115] Uniform Probate Code § 6-107.

[116] *Id.* §§ 2-401 to -404. These are merely suggested dollar amounts which states may see fit to alter. Uniform Probate Code Art. 3, Part 4, General Comment.

[117] Uniform Probate Code Art. 3, Part 4, General Comment.

[118] Myers v. Laird, 230 Miss. 675, 93 So. 2d 828 (1957); *In re* Lewis, 194 Miss. 480, 13 So. 2d 20 (1943); Ladner v. Ladner, 128 Miss. 75, 90 So. 593 (1921).

[119] 128 Miss. 75, 90 So. 593 (1921).

The *Ladner* decision is consistent with true trust concepts. Creditors, in the absence of statute, may not reach the trust merely because the settlor has retained the power to revoke it at any time. However, the injustice of the rule brought statutory changes. Under the Bankruptcy Act[120] and many state statutes,[121] the creditors may exercise or require the exercise of the debtor's power to revoke. Also, a spouse or creditors may reach the proceeds of a tentative or Totten trust of a bank account where the only indication of trust is that the account stands in the name of the depositor as trustee for another.[122]

In Mississippi, most accounts are joint and survivorship accounts. Both the savings and loan statutes and the banking statutes expressly protect the institutions from liability for paying any party to the account.[123] Deposits in the statutory form are presumed to create a joint tenancy with right of survivorship, in the absence of persuasive evidence to the contrary.[124] The Mississippi Supreme Court has emphatically declared that proceeds of such an account may be held by the survivor free of the claims of creditors.[125]

In *Weaver v. Mason*,[126] a seller, a few weeks after he sold his dairy farm, shot the buyer. The seller then committed suicide. The victim's administratrix brought a wrongful death action against the murderer's estate. The action was settled by a judgment entered on a consent verdict for $25,000. Several years before the shooting, the seller had deposited $40,000 of his money in joint bank accounts in both his and his wife's names, with the right of survivorship. The Supreme Court held that the $25,000 wrongful death judgment could not be satisfied out of the proceeds of the joint accounts. Further, the Court said that proceeds of joint accounts "become the property of the survivor, constituting no part of the estate of the deceased joint owner."[127]

Only if the joint account were established in fraud of existing or future creditors would the court have held such an account subject to a creditor's claims.[128]

---

[120] 11 U.S.C. § 70(a) (3) (1952).

[121] 1 A. SCOTT, TRUSTS § 330.12 (3d ed. 1967).

[122] 1 A. SCOTT, TRUSTS § 58.5 (3d ed. 1967); 2 *id.*, § 330.

[123] MISS. CODE ANN. §§ 81-5-63, -11-61 (1972).

[124] Weaver v. Mason, 228 So. 2d 591 (Miss. 1969).

[125] *Id.*

[126] *Id.*

[127] *Id.* at 593, *quoting* Myers v. Laird, 230 Miss. 675, 93 So. 2d 828 (1957).

Would the heavens have fallen and past and future property titles been forever unstablized if the court had said: "Equity regards as done that which ought to have been done. No murderer shall be permitted to accomplish a gift to a donee which shall take preference over recompense to the victims of his wrongful act?" No better reason can be given for the Code's contrary position than the horrible result of *Weaver*.

The Mississippi cases do not discuss policy reasons for giving the proceeds of joint accounts to surviving joint tenants rather than to creditors who might have reached the account had the debtor not died. Rather, the cases are based on nothing more substantial than our fictitious concepts of estates in property and of the demise or flight of titles at death. Normally, at death, the title of a decedent flies to personal representatives, heirs, devisees, or legatees. It flies with creditors' claims attached to it. Decedent's successors take his title as of the moment of death with all its accompanying baggage. But the fiction of the law is that a joint tenant's title terminates at death. His surviving joint tenant takes nothing belonging to the decedent. Rather, all that remains is the survivor's title which dates from the time of creating the joint tenancy, including from that time forward the *jus accrescendi*.

Instead of examining life's realities, courts fantasize a race between titles. The surviving joint tenant's title wins that race. The decedent's estate has expired. He and his title demise together. Nothing is left for his survivors.

Realistically, a donee prevails over the just claims of creditors—although a creditor could have caused a severance of the joint tenancy for the purpose of satisfying his claim.[129] If an irrevocable gift has been made, not in fraud of creditors, the result is not unjust. The creditors could reach the limited interest retained by the donor. But surely it is wrong to insulate property interests from claims of creditors where the debtor could easily regain the property for himself. And, in the case of Mississippi revocable trust and joint tenancy bank accounts, the debtor could use the entire account for his own purposes.[130] The Code rule under section 6-107 is certainly preferable, particularly because it carefully defines the rights and procedures for recovering the proceeds so that the decedent's estate plan will be disrupted only to the extent necessary to assure payment of debts, taxes and family allowances.

A survivor who receives payment from a multiple-party account is "liable to account to the personal representative for amounts the decedent owned beneficially immediately before his death."[131] The duty to account exists only "to the extent necessary to discharge such claims and charges remaining unpaid after application of the decedent's estate."[132] This precludes the possibility that the personal representative might first recover from the survivor, and then reduce, by compromise or settlement, the amount of claims and charges against the estate. Further, the personal representative may not commence an action to reclaim the proceeds of a multiple-party account unless he has received a written demand from the decedent's surviving spouse, creditor, child or representative of a minor or dependent child.

---

[128] Weaver v. Mason, 228 So. 2d 591, 592 (Miss. 1969).

[129] 20 Am. Jur. 2d *Contenancy and Joint Ownership* § 21 (1965).

[130] Miss. Code Ann. §§ 81-5-63, -11-61 (1972).

The personal representative is thus precluded from seeking the proceeds of multiple-party accounts solely for the purpose of increasing the size of the estate to be administered. He is also protected against charges that his failure to proceed has caused loss to the persons who are entitled to make the written demand. More important, generally the spouse or children will be the survivors entitled to the proceeds of the multiple-party account. Then, only creditors or tax authorities could be prejudiced by insufficient assets. The survivors might prefer to pay the creditors. The rights of tax authorities are determined by the applicable tax law, and not by the Code.

The personal representative may recover the account proceeds either from the financial institution or from the survivor if the institution has paid the proceeds to him.[133] The institution may pay the proceeds in accordance with the terms of the account, unless it has been served with process in an action brought by the personal representative. Such an action may be commenced no later than 2 years following the death of the decedent.

V. PROTECTION OF FINANCIAL INSTITUTIONS PAYING MULTIPLE-PARTY ACCOUNTS

A. Existing Mississippi Law

A deposit account establishes a contractual debtor-creditor relationship between the bank and its depositor.[134] The contract may be found expressed in reasonable regulations and terms established by the bank. The depositor's signature card, deposit slips, withdrawal slips, and passbooks may set forth terms of the contract, often including or referring to the bank regulations. In the absence of express provision, courts may find terms "implied" from banking customs and practices.

---

[131] UNIFORM PROBATE CODE § 6-107.

[132] *Id.*

[133] *Id.*

[134] Staley v. Brown, 244 Miss. 825, 146 So. 2d 739 (1962).

Statutes also may govern some phases of the contract.

At common law, the bank may not deny the title of its depositor, and must pay the depositor on proper demand. However, the depositor's right to receive the deposit ends where an adverse party, the true owner of the deposit, asserts his ownership rights.[135]

After receiving notice of an adverse claim, a bank, unless a statute provides otherwise, "must hold a deposit a 'reasonable' time . . . in order to give the adverse claimant an opportunity to take legal steps to assert his rights."[136]

A bank might make its own determination of ownership rights and pay the true owner. If correct, it would not be liable to other claimants. However, it would not be protected against the threat of litigation by a disappointed claimant. If it decided to hold the deposit for a reasonable time to permit the adverse claimant to file a legal action, it might be subjected to an action charging that the deposit was not held for a reasonable length of time. The depositor might also sue the bank for refusing to pay his check on demand.

Banking institutions are ill-suited for the resolution of disputes between customers and third parties. The bank has no interest in the deposit. It should not be required to bear unreasonable burdens of time and expense to protect itself against possible double liability.

Accordingly, Mississippi has adopted an adverse claimants statute.[137] An adverse claimant, to stop a bank payment to its depositor, must either procure a court order restraining payment, or post an indemnity bond with the bank. Otherwise, the bank may refuse to recognize the adverse claim. If the adverse claimant seeks an injunction, the bank is not bound unless the depositor is a party to the action and has been served with summons. If the adverse party posts a bond with the bank, the form of the bond and the sureties must be acceptable to the bank. The bond must indemnify the bank against all liability, loss, damage, costs, and expenses resulting not only from the assertion of the adverse claim, but also for dishonoring the check or order of its depositor. The simplest form of procedure for an adverse claimant to use is attachment or garnishment of the account. He must be careful to specify the identity of the depositor precisely.[138] The bank is not required to make a search of its records for deposits in other names. It would be a misdemeanor for the bank to disclose the identity of its depositors.[139]

The Uniform Commercial Code section 3-603[140] contains similar provisions respecting the discharge of a party liable for payment of a commercial instrument. A payor may pay any holder even though the payor knows that a third party disputes the holder's right to receive payment, unless the claimant "either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties."[141]

---

[135] Brandon v. Life & Accident Ins. Co., 149 Miss. 808, 115 So. 888 (1928).

[136] 10 AM. JUR. 2d *Banks* § 506 (1965).

[137] MISS. CODE ANN. § 81-5-67 (1972).

[138] Staley v. Brown, 244 Miss. 825, 146 So. 2d 739 (1962).

[139] MISS. CODE ANN. § 81-5-55 (1972).

[140] *Id.* § 75-3-603 (1972).

Section 81-5-67 of the Mississippi Code provides no answer to the question of whether or not one party to a two-name deposit may require the bank not to honor a demand by the other party for payment of an account. A typical example would be of the wife's lawyer calling the bank to stop withdrawal by the husband who is way ahead in the race to the bank.

Section 81-5-63 of the Mississippi Code is intended to cover the two-party situation. A deposit in the name of two or more persons may be paid to any one of the persons whether or not any of the other depositors are living or dead. The receipt of the depositor so paid is a valid and sufficient release, and operates as a discharge of any further liability. The receipt is effective as a discharge whether or not any other co-depositor is living or dead. It is effective even if the deposit is not in terms payable to a survivor.

In its original form, the first sentence of section 81-5-63 was identical with the Deposits in Two Names Act recommended by the American Bankers Association.[142] Section 81-5-67 is still substantially in the form of the Averse Claim to Bank Deposit Statute recommended by the American Bankers Association.[143]

The American Bankers Association is of the opinion that the adverse claims statute does not apply to a notice by one depositor in a two-name account ordering the bank not to pay the other depositor. It is further of the opinion that a:

> bank, paying to one depositor of a two-name account, after receiving proper notice by the other depositor not to pay, does so at its own risk, and may be compelled to pay again to the party entitled to the deposit. The Deposits in Two-Names Act, recommended by the American Bankers Association does not justify payment in this section.[144]

The primary purpose of Section 81-5-63 is to protect the bank which pays the survivor or survivors of co-depositors. Thus, in Mississippi it appears that the bank would be justified in paying a co-depositor despite the death of any other co-depositor. However, the statute is silent with respect to the disability of a co-depositor. It is therefore arguable that the Mississippi statutes do not cover cases where the bank receives notice of the disability of one of the parties. It may also be argued that they do not cover cases where the bank has received notice not to pay a co-depositor.

---

[141] *Id.*

[142] 11 PATON'S DIGEST OF LEGAL OPINIONS § 14 B:1, at 1688 (1942).

[143] *Id.* § 6:3, at 1657.

[144] *Id.* § 6:7, at 1659.

B. Rights of Parties Separate from Rights of Financial Institutions

The Code is organized so that provisions regulating relationships between the parties to a multiple-party account are separate from the provisions regulating the relationship between the financial institutions and the parties.[145]

Insofar as the relationship between parties is concerned, the Code recognizes that it is not desirable to make a form of a deposit account conclusive as to the intention of the depositors and the rights of parties.[146] Most depositors establish accounts without the aid of counsel and are often unaware of the legal consequences of their actions. Hence, the Code provides easily understandable forms of accounts which generally will be understood by the depositor and reflect his actual intention with respect to the disposition of the account.

Except for the P.O.D. account provisions for survivorship, the provisions of the Code yield to clear and convincing evidence of a different intent.[147] It is extremely unlikely that any depositor would create a P.O.D. account with any other intention than to make the balance payable to the named P.O.D. beneficiaries. A different intention, if it existed, should be established according to the ordinary rules of law respecting fraud, duress, mistake or other invalidating cause. In other cases, the equitable standard of proof—clear and convincing—protects depositors who act imprudently or wish the terms of their relationship with other parties to remain indefinite.

The provisions dealing with the relationship between the financial institutions and its depositors, however, should be definite and clear. Definiteness is as much to the advantage of depositors as the financial institution. Estate planning facilities would not be offered if institutions did not know that they would be protected from unwarranted litigation, particularly the nuisance variety that thrives on death.

C. Regulations and Signature Requirements

Under the Code a financial institution may pay any multiple-party account, on request, to any one or more of the parties.[148] The Code defines party as a person "who, by the terms of the account, has a *present* right, subject to request, to payment from the multiple-party account."[149] It also includes guardians, conservators, personal representatives, assignees, or attaching creditors. Persons whose rights depend upon survivorship, such as P.O.D. payees and trust beneficiaries, do not become parties until the account becomes payable to them.

---

[145] UNIFORM PROBATE CODE § 6-102, Comment.

[146] *Id.*

[147] *Id.* § 6-103, Comment.

Request is defined broadly. A party making a request for payment must comply with the signature requirements and other regulations of the financial institutions. If regulations of the institution or applicable law require advance notice of an intention to withdraw the account, the party must also wait until the period has expired. However, for the purposes of the multiple-party account provisions of the Code, request for payment or notice of intention to request a withdrawal is treated as immediately effective.[150] Thus, if a depositor gives a 30-day notice of an intention to withdraw a time deposit on the interest-payable date, the entire account would thereafter be deemed the property of the depositor. If the depositor died before the payment date, his estate would be entitled to the account, not surviving joint depositors, P.O.D. beneficiaries or trust beneficiaries.

However, the financial institution may not make such a payment if another party to the account able to request payment has notified the financial institution, in writing, that it should no longer permit withdrawals.[151] Thereafter, unless the notice is withdrawn, the successor of any deceased party must concur in any demand for withdrawal if the financial institution is to be protected.

The financial institution is not required to make inquiry as to the source of funds received for deposit, nor to inquire as to the proposed application of any sum withdrawn from an account, for the purposes of establishing net contributions.[152] Parties to a joint account must bear the risk of excessive withdrawals by one of the parties. A financial institution should not be burdened with a duty to police private transactions between their depositors. To impose such a duty would subject it to possible harassment and unfounded litigation whenever one party absconds after withdrawing an account. In view of the speed and volume of banking transactions, it would be difficult to preserve or to gather evidence to refute false charges. It would be unlikely that anyone would remember the questioned transaction.

---

[148] *Id.* § 6-108.

[149] *Id.* § 6-101(7).

[150] *Id.* § 6-101 (12).

[151] *Id.* § 6-112.

[152] *Id.* § 6-108.

D. Payment of Joint Accounts

If the account is a joint account, the financial institution may pay any sum to any party even if the institution knows that another party is incapacitated or deceased at the time.[153] This accords with the use of the account as a substitute for guardianship or administration proceedings.

The financial institution may, in two cases, pay the personal representative or heirs of a party to a joint account: (1) If the party was the last surviving party, the institution may pay the account upon presentation of proof showing the order of death; (2) Even if the deceased party is not the sole surviving party, the financial institution may pay his personal representative or heirs if "there is no right of survivorship under Section 6-104."[154] Section 6-104(a) provides that joint-account survivors own the account "unless there is clear and convincing evidence of a different intention at the time the account is created." The Code is not clear with respect to the bank's obligation to determine whether or not the joint account was intended as a true survivorship account. The Code neither authorizes nor forbids the bank to hold the account pending settlement of a dispute. Neither does it specify that any particular form of evidence constitutes clear and convincing evidence upon which a financial institution may rely in paying a decedent's successors rather than surviving parties to the account.

E. Payment of P.O.D. Accounts

Parties to a P.O.D. account are designated as original payees or parties and P.O.D. payees or beneficiaries.[155] A financial institution may pay, on request, any original party to the account.[156] The institution may pay a P.O.D. beneficiary or the personal representative or heirs of a deceased P.O.D. payee upon presentation to the institution of proofs of death showing that the P.O.D. beneficiary survived all persons named as original payees.[157]

A financial institution may pay the personal representative or heirs of a deceased original payee only if proofs of death submitted to the institution show that the decedent was the survivor of all other persons named on the account either as an original payee or as a P.O.D. payee.[158]

This is in accord with the nature of the P.O.D. account. No provision is made for showing by any form of evidence that a P.O.D. account was not intended. A person claiming that such an account was not intended would have to rely upon invalidating rules such as fraud, duress, or mistake. Presumably, they would be required to file suit or post bond in accordance with the provisions of the Adverse Claim to Bank Deposit Statute.[159]

---

[153] *Id.* § 6-109.

[154] *Id.*

[155] *Id.* §§ 6-101(7), -101 (12).

[156] *Id.* § 6-110.

[157] *Id.*

[158] *Id.*

F. Payment of Trust Accounts

The financial institution may, on request, pay a trust account to any trustee. It may also, on request, pay any trust beneficiary or beneficiaries if proof of death is presented to the institution showing that such beneficiary or beneficiaries survived all persons named as trustees. It may also pay the personal representatives of a deceased trustee if proof of death is presented showing that the deceased trustee survived all other persons named on the account either as trustee or beneficiary. However, the Code precludes such payment to the personal representative or heirs of a deceased trustee if the financial institution has received written notice that a deceased beneficiary has a vested interest in the account which is not dependent upon his surviving the trustee.[160]

G. Release of Financial Institution from Liability

A financial institution which pays joint accounts, P.O.D. accounts, or trust accounts in accordance with the Code is given blanket protection against further claims.[161] Such payment discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between parties, P.O.D. payees, or beneficiaries, or their successors. The protection provided has no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts. However, any party able to request present payment for himself, may give the financial institution written notice to the effect that withdrawals in accordance with the terms of the account should not be permitted. The protection afforded by the Code immediately ceases, and does not extend to payments made after receipt of such written notice.

With respect to such written notices, the Code states:

> Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in any demand for withdrawal if the

---

[159] MISS. CODE ANN. § 81-5-67 (1972).
[160] UNIFORM PROBATE CODE § 6-111.
[161] *Id.* § 6-112.

financial institution is to be protected under this section.[162]

Since the Code states that the protection afforded by its provisions does not extend to payments made after it receives written notice from a party not to permit withdrawal, by inference, the financial institution must hold the account until the written notice is withdrawn. By inference, also, other parties entitled to request payment should not thereafter be permitted to hold the bank liable, regardless of its knowledge or opinion with respect to the actual beneficial interests of the parties. And by inference also, if the written notice remains in effect, the financial institution may not pay all of the surviving parties to the account unless the successors of deceased parties concur in the demand for withdrawal.

Financial institutions and their lawyers may understand all of the inferences and implications possible in correlating the Code language with commercial practices. However, the Code should give more clear guidance to attorneys for persons with conflicting claims to the account. Must they sue or post bond? If suit or posting of bond is not necessary, what evidence or proof of beneficial interest may attorneys present to the financial institution in order to impose upon it a legal duty to pay their clients?

It may be the Code's intent that the financial institution simply refuse to pay any party until the interested parties resolve the dispute between them. If that is the intent, it should be so stated. On the other hand, it is more likely that the draftsmen intend that the law remain indefinite in this area and that supplemental principles of law apply, including the right of the institution to protect itself by contract.

Probably, such a question would seldom arise for an objector would probably withdraw his share of the account himself if he were able to beat his co-depositor to the bank. Nevertheless, if such a withdrawal were wrongful, or impractical for any reason, an objector and his adversary should have a statutory basis for further action necessary to resolve a dispute. The financial institution may protect itself by express terms in the deposit contract. The dispute is between the parties to the multiple-party account who will have agreed to such terms.

H. Rights of Set-Off

A bank may withhold from a deposit an amount equal to any debt owed to the bank by its depositor.[163] The Code gives a similar right to all financial institutions to set-off against a multiple-party account any indebtedness owed to the institution by a party to the account.[164] The party against whom the set-off is asserted must have, or have had immediately before his death, a present right of withdrawal. The right of set-off exists only with respect to the party's proportionate share in an account. In the absence of proof of net contributions establishing the proportionate share of the debtor, it is presumed that the depositor's share is equal to that of all parties having present rights of withdrawal.[165]

---

[162] *Id.*

[163] Moreland v. People's Bank of Waynesboro, 114 Miss. 203, 74 So. 828 (1917).

VI. PROVISIONS IN WRITTEN INSTRUMENTS FOR PAYMENT OR TRANSFER AT DEATH

The Code facilitates the use of commercial transactions for the purpose of transferring property at death.[166] This is not a new principle. Many forms of transactions effective as contracts, conveyances, gifts, or trusts have been held nontestamentary even though, as part of the transaction, a third party beneficiary is entitled to receive property from a decedent only at the owner's death and, even then, only if the owner has not exercised a reserved power of revocation or amendment.

Thus, in *Hewitt v. Frazier*,[167] a contract for the sale of a pharmacy store provided that the buyer's interest should pass, if he died, to his wife and parents. The Mississippi Supreme Court held that the buyer acquired an estate or interest determinable upon his death or incapacity, and that his wife and parents acquired an estate in remainder, subject to the claims of the creditors of the drug business.

Under the Code, certain provisions may be included within written instruments, which, in some cases, have been construed to be invalid as attempts to make testamentary dispositions of property without complying with the statutes of wills.[168] It will no longer be necessary to scrutinize every transaction permitting a transfer at death to determine whether or not an inter vivos interest has been created.

The Code covers insurance policies, contracts of employment, bonds, mortgages, promissory notes, deposit agreements, pension plans, trust agreements, conveyances or any other written instruments effective as contracts, gifts, conveyances, or trusts.

Under Section 6-201(a) of the UPC,[169] the three following types of provisions may be included in such written instruments, without invalidating either the instrument or the provisions as testamentary: (1) that money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently; (2) that any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or promisor before payment or demand; (3) that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will executed at the same time as the instrument or subsequently.

---

[164] UNIFORM PROBATE CODE § 6-113.

[165] *Id.*

[166] *Id.*

[167] 219 So. 2d 149 (Miss. 1969).

[168] UNIFORM PROBATE CODE § 6-201, Comment.

[169] *Id.* § 6-201(a).

Under existing law, such provisions are valid if embodied in a written instrument admissible to probate as part of the decedent's will. If not valid as part of the decedent's will, such provisions will be valid only if the designated recipient has been vested, during the decedent's lifetime, with some form of judicially protected legal or equitable interest. Examples are the contract interests of third party beneficiaries, the property interests of donees of future interests, and the trust interests of trust beneficiaries. If the owner has created such an interest by an effective inter vivos transaction, the provisions may be upheld even though possession and beneficial enjoyment of the interest are postponed until the owner dies. It may be valid although the owner has reserved an inter vivos power of revocation or amendment.

The legal mind can conceptualize the difference between a donee's revocable future interest and a devisee's expectancy under a will. The lay mind of a donee or devisee cannot. Each sees only the practical results. From a practical point of view, neither has power to prevent an inter vivos revocation or amendment of his interest or expectancy. Each takes an interest only when the donor or testator dies.

The only substantial difference is that if a writing is deemed to be testamentary in nature, rather than nontestamentary, the writing must be admitted to probate as a will, and the property must be administered as part of the decedent's estate. If, however, a valid nontestamentary interest has been created, the interest of the donee will vest in possession and ownership when the owner dies. The property need not be administered as part of an estate. This results in a substantial saving of time and expense.

The benefit of avoiding probate is particularly evident in the case of an executory contract. It is much simpler for an obligor to deal directly with a designated survivor than to attempt to complete performance within the strait jacket or probate administration.

The Code will not affect, in any way, cases now permitting transfers to take effect at death in accordance with valid contracts, gifts, conveyances or trusts. Such transactions will remain valid. The Code applies to written instruments only, and has no effect on oral transactions.[170]

At the other extreme, if a transaction is intended solely as a testamentary disposition, it must be executed in the manner required by the Code. Undelivered deeds, sham contracts, dry trusts and other forms of transactions, not judicially enforcible by or against an owner, will not operate at his death to dispose of his property.

Mississippi law permits an instrument to be admitted to probate as a will if it conforms to the statute, no matter what name the testator may have given it.[171] The Code would reach a similar result.[172]

The only change the Code will make is with respect to valid, inter vivos transactions which fail to create a legally recognizable interest in the death recipient. Rather, they contain language which appears to be more testamentary in nature. It is clear that an owner intends that the recipient shall take an interest only at the owner's death. It is also clear that the owner reserves the right to terminate the interest at any time. It is not so clear, however, that the recipient's interest is one which may confidently be labled as that of a third party beneficiary, remainderman, or cestui que trust.

The Code takes the position that the rights of the recipient should not be determined upon the basis of whether the decedent has created an interest in the recipient during the decedent's lifetime. Rather, the rights should be determined upon the basis of whether an inter vivos transaction is effective as the transaction intended. If the transaction is so effective, it will have created rights which are judicially enforceable. If the evidence of the transaction justifies a court in enforcing other aspects of the transaction, that evidence ought also to justify a court in enforcing the decedent's directions regarding the disposition of his property. Insofar as fraud is concerned, the evidence of the business nature of the transaction, coupled with the requirement that it be in writing, ought to be as satisfactory proof of the decedent's intentions as a duly executed will. Quibbling over technical differences between testamentary and nontestamentary acts only serves to defeat the intentions of the decedent. It does not make sense for the personal representative of an estate to be able to enforce such a transaction for the benefit of the decedent's estate, and then dispose of the benefits gained clearly contrary to the express wishes of his decedent.

Nevertheless, lawyers may feel a little squeamish about the designation of the beneficiary in a separate writing, particularly a subsequent writing. However, if the intention of the decedent is clearly expressed in a written instrument enforceable as the transaction intended, it is more likely that his intentions will be carried out if the separate writing is also given effect. The form and nature of the business transaction will provide ample safeguards against fraud.

---

[170] *Id.* § 6-201, Comment.

[171] Peebles v. Rodgers, 211 Miss. 81, 50 So. 2d 632 (1951).

[172] UNIFORM PROBATE CODE Art. 2, Part 5, General Comment.

The authors of the Code think that section 6-201 will be particularly effective with respect to family arrangements.[173] A person may loan money and take back a promissory note payable to him as long as he lives, and, after he dies, payable to his wife or other member of his family. A parent may also loan money to a child, and take back a promissory note providing that the obligation to pay shall cease when the parent dies. A businessman may enter into a contract under which his wife or children may continue to perform the contract after his death, and be entitled to receive the benefits of the other party's performance. Experience with insurance policies, pension plans, annuity contracts, revocable living trusts, joint bank accounts, and United States government bonds has demonstrated that the failure of those transactions to comply with applicable statutes of wills has not produced any measurable evil.[174]

Unlike the provisions with respect to multiple-party bank accounts, the UPC does not expressly permit a personal representative to reach property or proceeds passing from the decedent pursuant to inter vivos contractual arrangements. Neither does the UPC deny such rights. It merely provides that nothing in section 6-201 shall limit the rights of creditors under other laws of the state.[175]

In some cases under this section, the property passing would be exempt by law from the claims of decedent's creditors. A typical example would be the proceeds of an insurance policy.[176] In other cases, the property might be unreachable because, under existing law, the recipient's interest is deemed vested prior to death and, hence, not a part of the decedent's estate for any purpose. But there will be cases under section 6-201 which would be deemed invalid as testamentary transactions but for the operation of this section. The property involved would be reachable by creditors under present law, not because of the law of creditors' rights, but because the intended recipient has no right to the property at all.

Since the present theoretical basis for denying the right of personal representatives to reach vested property and contract interests is that such interests do not become a part of the decedent's estate for any purpose, it would seem that logic demands the same result with respect to all property covered by the operation of section 6-201. None of such property is a part of the decedent's estate.

---

[173] *Id.* § 6-201, Comment.

[174] *Id.*

[175] *Id.* § 6-201 (b).

[176] MISS. CODE ANN. §§ 85-3-11, -13, -15 (1972).

More realistically, however, the true inquiry should be whether the decedent's family and creditors have a greater equity than the death recipient. The equity of the family and creditors is the same whether the transaction is nontestamentary under present law or under the more liberal provisions of the UPC. Presently, Mississippi law permits the decedent to defeat the claims of the family and creditors.

The author prefers that the provisions of section 6-107 regarding multiple-party accounts be adopted with reference to property passing under section 6-201. Unless he receives property expressly exempted from execution by other provisions of law, a donee recipient should not prevail over the family and creditors of the decedent. Such a result would be consistent with the Code's treatment of the surviving spouse's elective share. Computation of the elective share includes property gratuitously transferred during the decedent's life, and a surviving spouse may reach such property in the hands of donee recipients who must contribute proportionately if other property in the estate is insufficient to pay the elective share.[177]

CONCLUSION

The Code philosophy and comprehensiveness is evident from its treatment of the preceding forms of inter vivos transactions. In one form or another, all of those transactions have proved satisfactory and useful in various jurisdictions. Under the Code, they should be of greater value to the lawyer.

Form is particularly important in property transactions. The Code wisely provides forms to expedite inter vivos transactions which may also serve as substitutes for guardianships or wills. At the same time, it frees forms from possible misuse by providing that interested parties may show, by clear and convincing evidence, that a deceased or disabled person did not actually intend the consequences resulting from his use of a particular form.

The Code provisions on probate administration are equally flexible and realistic. They will make possible a post mortem administration of an estate as efficient as if the decedent had created an inter vivos revocable trust. Those provisions will be discussed in an article now in preparation.

---

[177] UNIFORM PROBATE CODE §§ 2-201 to -207.

EFFECTIVE COUNSEL FOR PERSONS FACING CIVIL COMMITMENT: A SURVEY, A POLEMIC, AND A PROPOSAL†

Elliott Andalman and David L. Chambers***

INTRODUCTION

Pay a visit, if you can, to one of the many vast, old mental hospitals that dot the American countryside. Chat with some patients—many will be eager to talk—about how they got there and what has happened to them. In most such hospitals a majority of the patients will have been committed involuntarily.[1] These patients, most of whom are poor, will have shuffled through perfunctory commitment hearings that lasted 5 or 10 minutes. If represented by a court-appointed attorney, they are unlikely to remember the attorney's name (or the attorney theirs) because the attorney rarely meets the client until a few minutes before the hearing and rarely does much at the hearing itself.[2] Many states avoid the sham by not providing counsel to anyone.[3]

Appellate courts, however, are now beginning to hold that persons facing civil commitment have a constitutional right to representation by Counsel.[4] Within a few years it is likely that all states will have to provide counsel for indigents at commitment proceedings—not just a person with a bar card who introduces herself to the patient as the hearing begins, but rather an advocate who pursues her client's desires with the same ardor expected in other civil and criminal settings.

This article outlines systems for providing persons facing civil commitment with effective counsel at reasonable cost.[5] It is based on a review of the literature on existing counsel systems and visits by Elliott Andalman, one of the authors, to four cities (Chicago, New York, Cleveland, and Memphis) where counsel is regularly provided today. What we have found, to our chagrin and professional embarrassment, is that attorneys appointed by courts for nominal fees to represent allegedly ill persons rarely expend any effort on their clients' behalf. On the other hand, we have also found that counsel working full time on commitment cases and related mental health matters as advocates often can succeed in aiding their clients, at least when working in a setting in which the judges involved are sensitive to the freedoms that are imperiled. Attorneys can, in fact, often reach results that are satisfactory to the clients, and, incidentally, satisfactory to the patient's family and to the physicians who have examined the patient. A draft of legislation embodying recommendations for relying primarily on full-time counsel is set forth in the appendix and explained in the text.

---

†The genesis for this article was a report prepared for the Michigan Legislative Committee to Revise the Mental Health Statutes, written by Elliott Andalman, who, during the development of the report, argued almost daily about its content with David Chambers. The report spurred the authors to prepare this jointly written article. The views expressed are, of course, those of the authors and not necessarily those of the committee or its staff.

*B.A. 1970, Stanford University; J.D. 1973, University of Michigan. Partner, Andalman, Bergmark, and Ratcliff; Hattiesburg, Mississippi.

**Associate Professor of Law, University of Michigan Law School. A.B. 1962, Princeton University; LL.B. 1965, Harvard.

[1] *See* S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 17 (Rev. ed. 1971).

[2] See the description of current counsel systems in Part IV of this article.

[3] As of 1970, only 24 states provided counsel in all hospitalization cases in which the person alleged to be mentally ill was unrepresented. *See* S. BRAKEL & R. ROCK, *supra* note 1, at 54. Mississippi is one of the states that does not currently provide counsel.

[4] *See* note 6 *infra*.

[5] Recommendations for a system of counsel should not be read as implicitly endorsing

I. THE CONSTITUTIONAL RIGHT OF PERSONS FACING COMMITMENT TO COUNSEL SERVING AS ADVOCATE

Each of the several federal and state appellate courts that has recently considered the issue has held that indigent persons facing civil commitment have a right to appointed counsel.[6] Decisions have relied on the due process clause of state constitutions and on the 14th amendment to the United States Constitution. The United States Supreme Court has not specifically ruled on the question, but its holdings in analogous areas point unwaveringly toward the same result and have indeed guided the actions of the lower courts that have announced the

---

the current practice of involuntarily committing each year tens of thousands of persons labelled mentally ill. The more that is learned about the small degree of self-determination that any of us can claim, the foggier becomes the justification for a system of civil commitment for persons who are "ill" and a system of criminal commitment for those who are "bad." The more that is learned about the impact of hospitals and prisons on those sent there, the less wise it appears to send nearly so many to either. The authors would thus favor substantially narrowing the range of persons currently permitted to be involuntarily incarcerated, whether the place to which they are sent is labelled a hospital or a prison.

[6] *In re* Barnard, 455 F.2d 1370 (D.C. Cir. 1971); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *appeal docketed*, No. 73-568, U.S. S. Ct., Oct. 1, 1973; Dixon v. Attorney General, 325 F. Supp. 966 (M.D. Pa. 1971); Denton v. Commonwealth, 383 S.W.2d 681 (Ky. 1964); People *ex rel.* Woodall v. Bigelow, 20 N.Y.2d 852, 231 N.E.2d 777, 285 N.Y.S.2d 85 (1967); People *ex rel.* Rodgers v. Stanley, 217 N.E.2d 636, 270 N.Y.S.2d 573, 17 N.Y.2d 256 (1966). In *Lessard* the court held that "an individual sought to be detained on grounds of mental illness has the right to counsel, including appointed counsel if the individual states that he is unable to afford counsel." 349 F. Supp. at 1098.

right.[7] Most relevantly, the Supreme Court, in *In re Gault*,[8] held in 1966 that juveniles have a right to counsel under the due process clause in delinquency proceedings that may lead to confinement. In *Gault*, the Court expressly rejected arguments that counsel need not be provided because the state's purposes in committing juveniles were rehabilitative rather than punitive, civil rather than criminal.[9] The deprivation of liberty, the Court found, is the same whether the state characterizes that deprivation as punishment or rehabilitation. More recently, the Court has extended its holding of a right to counsel in felony cases to a right to counsel in all criminal cases in which a jail term may be imposed, including misdemeanors and petty offenses.[10] As in *Gault*, the Court stressed the possible loss of liberty[11] and the distressing hastiness of most proceedings,[12] rather than the fact that the proceedings were labelled "criminal." Both loss of liberty and hasty adjudication are central characteristics of the civil commitment process. Unless the Court is prepared to scuttle its reasoning in *Gault* and related decisions, it is almost certain to hold, when presented with the question, that states must provide counsel to all indigent persons it seeks to deprive of liberty because of an alleged mental illness.[13]

Moreover, the right to appointed counsel, if it is to have any content at all, must entitle an indigent to something more than a person labeled "counsel," who does nothing in her client's behalf.[14] What counsel must do, of course, is to perform the function which justifies requiring her appointment in the first place—assist the client in avoiding an undeserved loss of liberty. The specific components of the attorney's responsibilities, in contexts in which physical freedom may be lost, have been most fully developed in criminal cases where it is clear that counsel must serve as an advocate.[15] The Supreme Court in *Gault*, however, did draw a quick sketch of counsel's role in juvenile cases that extends her traditional duties as advocate into the "civil" setting:

---

[7] *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1966); Kent v. United States, 383 U.S. 541 (1966).

[8] 387 U.S. 1 (1966). *See also In re* Winship, 397 U.S. 358 (1970); Kent v. United States, 383 U.S. 541, 554 (1966).

[9] 387 U.S. at 23-24, 27.

[10] Argersinger v. Hamlin, 407 U.S. 25 (1972).

[11] *Id.* at 37-38, 40.

[12] 387 U.S. at 11 n.7, 19-20; Argersinger v. Hamlin, 407 U.S. 25, 34-37.

[13] In Briggs v. Arafeh, 411 U.S. 911 (1973), the Court affirmed without opinion, Justices Douglas and Powell dissenting, a three-judge Connecticut district court decision upholding a statute permitting 45-day emergency commitment without a hearing when followed by a full hearing in which counsel is provided to indigents. Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972).

[14] In the words of the Supreme Court of Mississippi, in the context of a criminal case, the trial court must step in where it is apparent that the "attorney for the defendant . . . is doing nothing to represent the interests of [the client]." Stewart v. State, 229 So. 2d 53, 56 (Miss. 1969).

> A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.[16]

A three-judge federal district court in Wisconsin, the only court that has yet discussed the duties of appointed counsel in civil commitment proceedings for the mentally ill, has similarly held that the allegedly ill person is entitled to "representative counsel," one who views her role as that of "defense counsel."[17] Counsel for the mentally ill is thus cast in the role that the Code of Professional Responsibility[18] and hundreds of years of tradition have shaped for lawyers in all judicial proceedings: not merely a neutral advisor to the court but the ardent defender of the client's rights and freedoms.

We also believe that the Constitution requires states to establish a system of counsel in which the attorneys will have the time, incentive, and knowledge necessary to serve as effective advocates. In Part VI, below, we examine briefly the growing body of cases involving challenges to the constitutional adequacy of whole systems of assigned counsel.

II. An Explanation of Why Counsel Should Serve as an Advocate for the Desires of the Client

The Supreme Court of the United States, we have suggested, is highly likely to require that persons facing commitment are entitled to an appointed counsel who will serve as an advocate. If the Court does so hold, we believe that its decision will be correct not merely as a matter of constitutional doctrine, but also as a matter of wise policy. We know, however, that some readers will disagree. They will find the analogy drawn by the Supreme Court and other courts to the right to counsel in criminal cases too facile. Whether or not able to distinguish *Gault* and the other juvenile cases from civil commitment proceedings, they will have doubts about *Gault's* wisdom in injecting attorneys into settings in which the state's purposes are rehabilitative. They will believe that when the state is seeking to help an ill person, attorneys will simply impede that goal. Attorneys, they may claim, will introduce tension between the patient and the physician, will keep doctors away from treatment by tying them to the witness stand, and will rely on legal technicalities to force the release or delay the treatment of desperately ill persons.[19]

---

[15] *See* Anders v. California, 386 U.S. 738, 744 (1967) (counsel must be an "active advocate," not just an amicus to the court); Powell v. Alabama, 287 U.S. 45, 71 (1932) (where the state has a duty to provide counsel, the duty "is not discharged by an assignment under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case").

[16] 387 U.S. at 36 (footnotes omitted).

[17] Lessard v. Schmidt, 349 F. Supp. 1078, 1098-99 (E.D. Wis. 1972), *appeal docketed*, No. 73-568 U.S. S. Ct., Oct. 1, 1973.

[18] *See* ABA Code of Professional Responsibility EC 7-1 which reads as follows:

> [T]he duty of [counsel] is to represent the client zealously within the bounds of law. . . . In our government of laws and not of men, each member of our society is entitled . . . to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or defense.

This position, though commendable in its concerns, rests in part on the dubious premise that psychiatrists in public hospitals are today providing valuable treatment. Sadly, even in states today where counsel is not provided and hearings are perfunctory, public hospital psychiatrists rarely perform more than administrative functions. Patients rarely receive more than tranquilizing medication, enforced inactivity, and food and lodging.[20] There is even disquieting evidence that for many persons involuntary hospitalization worsens rather than improves their capacities to function in the outside world.[21]

To the extent that valuable care is being offered, attorneys acting as advocates can often foster rather than retard the hospital's own goal of treatment. In New York City, for example, where counsel-advocates work within the admitting hospitals, one of their principal functions has been to seek alternatives to hospitalization satisfactory to their clients (and to the hospital as well) so that long-term hospitalization together with the disabilities and dependencies it involves can be avoided.[22] In most cases, evidentiary hearings have been avoided altogether.[23] Lawyers can also serve to ensure that the hospital staff, who must deal with such large numbers of patients that their administrative needs tend to subvert their goals of individual treatment,[24] focus attention on the individual patient and form more careful decisions about the need for hospitalization and the appropriate type of care. Apparently in recognition of these valuable functions of counsel, and sensitive to the freedoms at stake, the American Psychiatric Association has itself called for substantial procedural protections for persons facing commitment, including the right to appointed counsel.[25]

---

[19] *See* Davidson, *Mental Hospitals and the Civil Liberties Dilemma*, 51 MENTAL HYGIENE 371 (1966). For such a view in the juvenile setting, see the opinion of Justice Stewart dissenting in *In re* Gault, 387 U.S. 1, 78-80 (1966).

[20] *See* the discussion of the absence of treatment in a study prepared for the American Bar Foundation. R. ROCK, M. JACOBSON & R. JANOPAUL, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL 69-70 (1968).

[21] *See, e.g.*, R. BARTON, INSTITUTIONAL NEUROSIS (2d ed. 1966); B. PASAMANICK, F. SCRAPITTI & S. DINITZ, SCHIZOPHRENICS IN THE COMMUNITY (1967); D. Rosenhan, *On Being Sane In Insane Places*, 13 SANTA CLARA LAW. 379, 394-98 (1973).

[22] Interview with Simon Rosenzweig, Director of the Mental Health Information Service in New York City's First Judicial Department, in New York City, June 26, 1972.

[23] *Id.*

The recognition that lawyers may perform a constructive role consonant with the goals of the hospital may lead some to the dangerous conclusion that lawyers should serve as advocates for their own (or the hospital staffs') mature and reasoned determination of the patient's best interests, not for the allegedly ill person's own view of her interests.[26] Many ill persons, according to this view, lack the capacity to reach a sensible judgment about what is good for them. This paternalistic attitude reflects a fundamental misunderstanding of the lawyer's role in our system of law. Many criminals might fare better if their wrists were slapped early in their careers rather than being acquitted on a technicality. The attorney appropriately fights for the criminal defendant's freedom not because the defendant is sensible in preferring it but, rather, because of a societal belief that persons facing a complex legal process that may lead to loss of freedom are entitled to an advocate who will articulate their desires and marshal the strongest case to support them. The mentally ill are likewise entitled to such an advocate.[27]

The court, which may draw upon expert advice of its choice, is the only proper party to decide what is in the ill person's and the public's best interest. The judge, not the attorney, must make this decision. The judge may not want this role, perhaps preferring, instead, an atmosphere of friendly cooperation in which all participants explore together what is in the ill person's best interests and all share, at least by acquiescence, in the choice of disposition. *Gault*, however, wisely spells an end to the era of coziness at the final hearing—an end to commitments in which the significance of the loss of freedom is smothered in warm smiles as everyone pretends that it is only the patient's interests that are being considered. In fact, the family members or police who petitioned for commitment are often motivated in part by the desire—not necessarily unjustified but clearly not selfless—to rid themselves of a troublesome presence.

---

[24] *See, e.g.*, E. GOFFMAN, ASYLUMS 74-83 (Aldine ed. 1962); D. VAIL, DEHUMANIZATION AND THE INSTITUTIONAL CAREER (1966).

[25] *Position Statement on Involuntary Hospitalization of the Mentally Ill*, 128 AM. J. OF PSYCHIATRY 1480 (1972).

[26] Little seems to have been written by the many attorneys who possess this protective attitude toward the allegedly ill client. For a precisely analogous statement in the juvenile field, see Edelstein, *The Duties and Functions of the Law Guardian in the Family Court*, 45 N.Y. ST. B.J. 183, 184 (1973).

[27] *See* the strongly stated position of the American Bar Association in its Code of Professional Responsibility, *supra* note 18.

Of course, attorneys in all settings should advise their client what they personally have concluded is in their client's best interests. But when the client decides what she wants, the attorney should aid her in promoting that goal. Attorneys who are queasy about advocating the position taken by a possibly ill person may be reassured by the evidence that mentally ill persons are not nearly as incapable of making sensible decisions for themselves as is commonly believed,[28] and, conversely, that psychiatrists are not nearly as capable of determining when a person is dangerous as is commonly believed.[29]

We do not wish to understate the difficulties the counsel will face in serving as advocate—indeed, we discuss some of those difficulties at length in the next section[30]—but the difficulties do not suggest to us a more passive or acquiescing role for the attorney.

Undoubtedly, the effect of active attorneys will be that fewer persons will be committed than otherwise would have been[31] and that, in a few cases at least, persons who could have profited from inpatient care will not receive it (or, put most alarmingly, that a few persons will commit suicide or homicide who would not otherwise have done so). Thus we come to a critical value judgment: Assuming that mental hospitals do provide valuable care in many cases, would we prefer that some persons who do not need or want inpatient treatment be committed in order to maximize essential treatment; or would we prefer that some persons who do need inpatient treatment not be committed in order to maximize freedom from unnecessary and unwanted treatment?

The authors, prizing freedom for those who want it, would opt for the risk of too little hospitalization. The drafters of the Bill of Rights and our state constitutions, in framing rights for criminal defendants, similarly preferred to risk freeing some of those for whom restraint was proper to avoid imprisoning those for whom it was not. There were no state-run mental hospitals in 1791, but the same sound reasons for establishing a criminal process that contemplates that the guilty will occasionally go free apply with at least equal force to the commitment of persons believed to be mentally ill.

---

[28] *See* D. VAIL, *supra* note 24.

[29] *See, e.g.*, Dershowitz, *The Psychiatrist's Power in Civil Commitment: A Knife That Cuts Both Ways*, 2 PSYCHOL. TODAY, February, 1969, at 43.

[30] See the latter portion of Part III, *infra*.

[31] For an empirical study reaching such a finding, see Wenger & Fletcher, *The Effect of Legal Counsel on Admissions to a State Mental Hospital*, 10 J. HEALTH & SOCIAL BEHAVIOR 66 (1969).

III. THE TASKS OF AN "EFFECTIVE" COUNSEL FOR PERSONS FACING COMMITMENT

In the first two parts of this article, we have argued that the Constitution and good judgment require that states provide persons facing commitment with an attorney who serves as an advocate. The tasks of an attorney-advocate in commitment proceedings are numerous and varied. We outline our view of them here because most attorneys are unfamiliar with the commitment process.[32] The regimen we prescribe may serve as a rough standard against which to judge the systems of counsel that are described in the next section. It has also served as our guide in molding the system of counsel that is recommended in the latter portion of this article.

As we have seen, the overall task of the attorney in commitment proceedings can be simply stated: to obtain for her client what the client desires after helping the client make an informed choice. That, of course, is the task of the attorney in almost all judicial proceedings. In practice, the client in commitment cases will generally desire either freedom from confinement or care through a facility less restrictive than a hospital. Even when a patient wishes inpatient hospitalization, she is likely to prefer admission on a voluntary basis to commitment under judicial compulsion.

To serve the client's interests, attorneys in mental health cases must, as lawyers must in other settings, first become familiar with the relevant statutes and procedural rules. Mastering the operative terms of these statutes (terms such as "mental illness" or "dangerous to self" or "in need of care or treatment in a mental hospital") will require that the attorney develop a specialized knowledge of mental health matters, comparable to the special knowledge required of a patent or malpractice attorney. She will need, for example, to become familiar with psychiatric terms for various sorts of illness, the reliability of the various diagnostic techniques, research on predictions of dangerousness, inpatient treatment techniques, and the range and effectiveness of available community resources for care, treatment, and supervision outside the hospital.[33]

---

[32] Other discussions of what lawyers need to learn in order to represent clients in mental health cases and what tasks they will need to perform can be found in Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424, 450-57 (1956); Ennis, *Civil Liberties and Mental Illness*, 7 CRIM. L. BULL. 101 (1971); Strand, *Legal Aid for Patients in State Mental Institutions: The Cleveland Experience*, 7 CLEARINGHOUSE REV. 483 (1972). *See also* Golten, *Role of Defense Counsel in the Criminal Commitment Process*, 10 AM. CRIM. L. REV. 385, 414-17 (1972).

[33] On predictions of dangerousness, attorneys might begin by looking at Dershowitz, *supra* note 29, at 43. For a general survey of alternatives to inpatient hospitalization and

Armed with this special knowledge, the attorney can handle individual cases in much the same way that a skilled criminal defense attorney handles her cases, with the same awareness that an individual's self image, reputation and liberties are in jeopardy. Typically the first step should be an interview with the client immediately upon receiving the appointment to learn the client's own perception of what is happening to her and to gain an initial impression of what action the client wants to take. At the interview the attorney should inform the client of the form and nature of the commitment process, of the client's rights within that process, and, when applicable, of her rights and privileges within the hospital.

After the interview the attorney should begin a careful factual investigation to develop a recommendation to present to the client of the disposition that the attorney concludes is in the client's best interests and to develop a factual basis for opposing involuntary hospitalization, if that is the position ultimately taken. The attorney's investigation will need to include some or all of the following: (1) interviewing those who initiated the commitment proceedings for their views of the client's problems; (2) interviewing the doctors who have recommended commitment (if that has occurred) and the doctors currently responsible for the client's care and release (if she is being held under some sort of temporary order); (3) interviewing family members or others who may have important information about the client or who may have a home to which the client may return; (4) examining all hospital records to which the attorney can obtain access; (5) surveying the availability and suitability of community programs; and (6) seeking independent expert advice from psychiatrists, psychologists, or social workers.

On the basis of this investigation the attorney should meet again with the client to advise her of the range of possibilities that may be open to her and the sort of placement or treatment, if any, that the attorney thinks will best help the client serve the client's own goals. The attorney should also forecast for the client the degree of likelihood that a court will order the client's commitment. Emphasizing strenuously and repeatedly her willingness to advocate in court the patient's release or any other permissible placement the client desires, the attorney should then seek a decision from the client as to the approach the client would like to take. If the attorney can obtain a clear directive from the client, often no easy task, her remaining function can be stated simply: to advocate the client's decision to the limits of the Code of Professional

---

their efficacy, *see* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107 (1972). A helpful introduction to psychiatry tailored for use by attorneys has been A. WATSON, PSYCHIATRY FOR LAWYERS (1968).

Responsibility,[34] whether or not she believes that the client's decision is sensible. Where the client refuses or is unable to give a clear directive to the attorney, the attorney's remaining function should be to seek the result that the attorney herself thinks will prove most satisfactory to the client.

If the commitment structure permits, the attorney should then try to secure the desired result prior to a hearing by negotiating with the client's doctor and, if appropriate, with family members, while at all times keeping her client closely informed of the opportunities that may be open. If negotiation fails, the attorney should prepare for and conduct a defense at a hearing with the same vigor expected of an attorney in a criminal case, or (if your standards for criminal defense are not exacting) with the vigor anticipated of a defense attorney in a civil negligence suit. Framing cross-examination, subpoenaing witnesses, objecting to the admission of improper evidence, and briefing legal arguments may all be required.

This exacting prescription for an adequate performance by attorneys representing persons facing commitment seems likely to produce two diverging skeptical reactions. Some, having doubts about attorney involvement or fears about the costs, will believe that far too much is being asked for each of the thousands of persons committed annually. Others, though in favor of substantial attorney involvement, may fear that, in practice, even at its best, attorney representation will fall far short of what we describe.

Those who fear excessive costs and consumption of state judicial and medical resources must come to grips with the Supreme Court's mandate in *Gault* that effective counsel be provided where liberty is at stake, regardless of the label attached to the proceeding.[35] An effective counsel is a person who does her best to carry out the client's lawful wishes. Less effort than is prescribed here is likely to lead to the attorney's failure either to explore possible alternatives for the client or to raise arguments or adduce evidence that could secure the client's freedom—failures that would be considered unjustifiable negligence in other legal settings.

Admittedly, for persons with legal training to advocate a vastly expanded role for lawyers is suspicious, not unlike plumbers lobbying for more demanding building codes. It is doubly worrisome when Supreme Court Justices and other judges who will define the lawyer's role are lawyers themselves. The suspicion is well founded. Social workers with additional training in law and procedure or specially trained paralegal professionals could adequately perform many, even all, of the functions herein prescribed for attorneys. Our real point is that what is needed is an informed advocate, regardless of title or formal education.

---

[34] *See* note 18 *supra*. *See also* M. Blincik, *Mental Disability, Legal Ethics and Professional Responsibility*, 33 ALBANY L. REV. 92 (1968).

[35] 387 U.S. 1 (1966). Furthermore it is not clear that providing effective counsel will, in fact, lead to the consumption of additional state resources. Millions of dollars are spent by states each year on the hospitalization of involuntarily committed individuals. A significant percentage of this expenditure might be avoided by providing persons facing commitment with effective counsel who could serve to encourage placements in less expensive and more pleasant settings. Rosenzweig interview, *supra* note 22.

To those who welcome the advocate's participation in the commitment process but doubt the feasibility in practice of the pat schedule of interview, investigation, advice, and advocacy, there is no fully adequate response. These critics are in large part correct. The problems that counsel will face are gargantuan.[36] In the initial stages of interviewing her client, the attorney, like lawyers in criminal cases, will find that while most clients are eager to talk, much of the factual information provided will not be corroborated by anyone else later interviewed. She will find as part of the problem that many clients are highly suggestible and give, rather than honest answers to questions, the answers the client believes the attorney wants to hear. The attorney is thus continually provided with unreliable support for her own favorite fantasies about psychiatrists, parents, or police. Clients may also be eager, in a way related to the problem of suggestibility, to convert the attorney into a parent role in which the attorney begins to feel personally responsible for the client and to make all decisions for the client; and attorneys may find in themselves a corresponding tendency to play that role. When the attorney assumes this position, she may, like the hospital, contribute to an ill person's declining capacity to make decisions.

Even when dealing with a client who is ready to make decisions on her own, the attorney will face the presently impossible task of accurately predicting for the client the effects of various alternatives. Since life for many persons facing commitment holds little promise of happiness regardless of the result of a hearing, the attorney is likely to find that the client and the client's family are later unhappy with her advice. All will be certain, in hindsight, that other available dispositions would have led to contentment and stability.

In providing advice or in acting on the decisions of her clients, the attorney must strive to be guided by a perceptive awareness of the special problems of the particular client rather than by her own broad views about the moral acceptability or the therapeutic value of hospitalization. Attorneys' moral views and attitudes toward hospitalization will reflect in substantial part their own underlying psychic need either to resist authority or to submit to it, to strive for freedom or to recoil from it, to reward deviancy or to punish it. They must then learn to grapple with these personal needs in ways that do not interfere with their capacity to advise and assist individual clients.

---

[36] The many roles and pitfalls for lawyers who deal with emotionally-charged problems of individuals have been well treated by several writers. *See, e.g.*, Burt, *Forcing Protection on Children and their Parents: The Impact of Wyman v. James*, 69 MICH. L. REV. 1259 (1971); Watson, *The Lawyer as Counselor*, 5 J. FAMILY L. 7 (1965).

Finally, at all stages, the attorney will be plagued by lonely patients who call daily, by clients who have fixed views of what they want but who change their fixed views several times a week, and by a few hospital staff persons who resent the attorney's intrusions and refuse to cooperate with even the most reasonable requests, except under official duress. There will also be judges who resent the industrious attorney's disruption of formerly peaceful commitment procedures and who will confound the attorney's efforts at ardent advocacy by subtlely conveying that if the attorney presses procedural arguments, or even substantive ones, she and her future clients will suffer.[37]

These special difficulties do not, however, suggest that courts should develop a different conception of the lawyer's role in civil commitment. Aggressive advocates of the traditional sort can stand as an important safeguard against unwarranted loss of liberty. What the difficulties do suggest is that attorneys working in the area need to develop not only special knowledge about psychiatric issues but also a high degree of self-awareness and sophisticated skills in interviewing and counseling. These special demands, in turn, indicate that wherever possible states should create systems of counsel that rely on persons who specialize in civil commitment matters on a full-time basis. The following descriptions of existing systems of counsel not only confirm the wisdom of relying on full-time attorneys but also sadly demonstrate that even systems that provide full-time counsel can still be grossly inadequate.

IV. Descriptions of Current Counsel Systems

During the summer of 1972, one of the authors made visits to four cities (New York, Chicago, Cleveland, and Memphis) to observe existing systems of counsel in civil commitment cases and to interview the attorneys involved.[38] His observations are set forth here, together with short summaries of counsel systems in the state of Iowa, and the cities of

---

[37] For a discussion of this phenomenon in juvenile court, see W. Stapleton & L. Teitlebaum, In Defense of Children 130-34 (1972).

[38] Elliott Andalman visited the cities. The authors are grateful for the cooperation of counsel in each of the cities visited. They have been doubly helpful by reviewing for accuracy an early draft of the descriptions here presented of their cities' systems of counsel.

Austin, Texas, and Phoenix, Arizona, which have previously been described by others.[39] From all we have been able to learn, the systems described reflect nearly the full range of types of legal assistance currently employed in commitment proceedings in this country. One exceptional program we regret having been unable to visit is the Public Defender Office in Washington, D.C. It appears to be providing a high quality of legal representation to its clients.[40]

A. Phoenix, Arizona

The Arizona civil commitment statute provides for the appointment of an attorney to each proposed patient who is not represented by privately retained counsel.[41] The Act requires that counsel be appointed "before the hearing," but does not elaborate on the counsel's responsibilities.

According to an article written in 1971 by Professors David Wexler and Stanley Scoville and students at the University of Arizona Law School,[42] the statute has been implemented throughout the state in several different ways. In most counties private attorneys are appointed to represent indigent persons facing commitment, while in one county a public defender is appointed at the hearings, and in another some commitments are ordered without the benefit of any counsel at all.

In Maricopa County, which includes Phoenix, hearings are held twice weekly, with as many as 18 cases heard at each session. One probate judge hears all commitment cases, and one attorney is appointed to represent all indigent persons facing commitment on any one day. The attorney is appointed on the day of the hearing or the day before and receives a compensation of $10 per case. Interviews and observations revealed that at most, the prehearing work of the appointed attorney involved a brief discussion with the client. Often there is no discussion at all.[43]

---

[39] *See* notes 42, 51 & 58 *infra*. Another excellent discussion of a state's commitment processes and the role of counsel in them can be found in Dix, *Acute Psychiatric Hospitalization of the Mentally Ill in the Metropolis: An Empirical Study*, 1968 WASH. U.L.Q. 485, 543-45. Dix describes commitments in St. Louis, where nominally paid counsel from the private bar represent patients at commitment. As described, counsel were as ineffective in St. Louis as in the three cities that we describe that also rely on the private bar. For a description of a system in which counsel is not provided and rarely present, *see* Morris & Luby, *Civil Commitment in a Suburban County: An Investigation by Law Students*, 13 SANTA CLARA LAW. 518 (1973) (describing Oakland County, Michigan).

[40] Information about the Mental Health Division of the Public Defender's Office in Washington, D.C. was obtained from a phone interview in June, 1972, with Herbert Silverberg, Chief of the Mental Health Division; a letter from Norman Lefstein, Director of the Public Defender Service for the District of Columbia to Chief Judge Bazelon, June 21, 1972, about the operation of the Mental Health Division; and a memorandum from Robert Golten, former Chief of the Mental Health Division, to the Directors of the Public Defender Service, Feb. 28, 1972, entitled "Two Year Review (February 1, 1970-January 31, 1972)."

[41] ARIZ. REV. STAT. ANN. § 36-514A (Supp. 1972). The statute reads, in part:

> At the time of apprehension or during detention, but before the hearing, the proposed patient apprehended shall be permitted to consult an attorney to represent him at the hearing. If he is not represented by an attorney, the court shall, before the hearing, appoint an attorney to represent him.

[42] Wexler & Scoville, *Special Project, The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 32-35, 38-42, 51-60 (1971).

The hearings were uniformly perfunctory, each averaging less than 5 minutes, not transcribed, and a state's attorney was rarely present. During each hearing the appointed counsel questioned the persons requesting commitment and the two examining doctors.[44] Generally, the appointed counsel asked each person who requested commitment only two questions: (1) Are the facts in the petition for commitment "substantially true?" and (2) Do you have anything to add to the petition? Almost invariably the answers to these questions were "yes" to the first and "no" to the second. Counsel moved on just as mechanically to the two examining doctors, generally asking each for her findings. The doctors would respond by stating their conclusions in a sentence or two, such as: "The patient is suffering from a major psychological disorder. He is psychotic, depressed and demonstrates inappropriate affect. I recommend that he be committed to Arizona State Hospital as an incompetent." They seldom gave any factual basis for their conclusions and the attorneys did not ask that any factual basis be presented.[45]

When the doctors concluded their testimony the hearing ended, except when the proposed patient asked to be heard. In those cases permission to speak was always granted. The judge then routinely entered the commitment order after the person being committed had been ushered from the room.[46]

Appointed counsel for the proposed patient in Maricopa County adopted a role indistinguishable from that which the county attorney adopted when she participated in proceedings on behalf of the petitioner.[47] Interviews with appointed attorneys revealed that they saw their role as insuring that all the required papers were in order. The attorneys normally relied completely on the recommendations of the examining doctors to determine if their clients should be committed. The common view of the attorneys was that, rather than advocate the release which a client desired, their role was to insure that their client received the treatment that the doctor recommended.[48]

---

[43] *Id.* at 32-35, 38, 54.

[44] The two persons requesting commitment and the two examining doctors are statutorily required witnesses. ARIZ. REV. STAT. ANN. §§ 36-514 A & B, 36-501 (Supp. 1972).

[45] Wexler & Scoville, *supra* note 42, at 38-40.

[46] *Id.* at 40.

[47] *Id.* at 53.

B. Iowa

The Iowa civil commitment statute provides for the appointment of an attorney to each proposed patient who appears at the commitment hearing without counsel.[49] The counties compensate the attorneys in amounts fixed by the district court. The statute makes no provision for appointed counsel at any step in the involuntary hospitalization process other than at the hearing itself and contains no statement of counsel's duties.[50]

According to a lengthy student law review note published in 1970,[51] county clerks in Iowa normally appoint counsel from a list of those local attorneys who have expressed a willingness to serve. In most counties a majority of attorneys volunteer, but in some a few attorneys handle most of the workload. Appointed counsel is customarily paid $15.50 for each case handled. Appointments are routinely made for all patients because only rarely does a patient retain her own attorney. Attorneys are usually appointed the day before the hearing is scheduled.[52]

The appointed attorneys observed rarely made any investigation into their clients' situations. In most cases, the first time the appointed attorney spoke with her client was the day of the hearing, typically just prior to the hearing. The attorneys contributed little to the hearings observed, which generally lasted from 15 to 30 minutes. Attorneys did not question the doctor's assessment of their clients' need for commitment. Most attorneys interviewed explained that their primary function at the hearing was to prevent their clients from being "railroaded" into the hospital by relatives rather than to serve as an advocate for the proposed patient's desires. Attorneys did claim, however, that more preparation might have been done for these hearings if they had been appointed earlier and if they were not compelled in effect to donate their time because of the nominal fee.[53]

---

[48] *Id.*

[49] IOWA CODE ANN. § 229.5 (1972) which provides, in part:

> If at said hearing such person appears without counsel or appearance is made in his behalf without counsel, the commission, before proceeding further, shall inform such person or persons appearing for him of his right to legal counsel, then if no counsel is employed, the district court shall assign him counsel. An attorney so assigned shall receive such compensation as the district court shall fix to be paid in the first instance by the court.

[50] *Id.*

[51] *Contemporary Studies Project: Facts and Fallacies about Iowa Civil Commitment*, 55 IOWA L. REV. 895, 913-23 (1970).

[52] *Id.* at 913-14.

[53] *Id.* at 913-23.

C. Austin, Texas

The Texas civil commitment statute provides for the appointment of an "attorney ad litem" to represent each proposed patient at commitment hearings.[54] The Code does not elaborate on the mechanics of appointment. The only guidance as to payment of appointed attorneys is that "the judge may allow reasonable compensation."[55] The only specific references to functions of the appointed attorney are that she shall sign the waiver of trial by jury[56] and that she may demand a trial by jury any time before termination of the hearing.[57]

Fred Cohen, then a professor of law at the University of Texas, described the practice in Austin in 1965.[58] At that time, committing judges held hearings at the local state hospital once a month. One attorney was appointed to represent all the patients facing commitment on any given day. The appointment was made about 3 weeks in advance of the hearings. Judges appointed attorneys on a rotating basis from among the younger members of the Austin Bar. Normally no one reluctant to serve was required to accept an appointment. The "reasonable compensation" was generally $10 per case, which was about average for the state.[59]

Interviews with appointed attorneys revealed that they normally did no investigation and did not even speak to their clients before the hearings. On one typical day of observation, 40 hearings were disposed of in 75 minutes, an average of less than 2 minutes for each case. The appointed attorney rarely asked any questions of the doctors who testified. His only observed task was to ensure that statutory notice requirements had been observed. No attorney or prosecutor was present to represent the state. The results of the hearings were virtually always what the doctors recommended.[60]

---

[54] TEX. REV. CIV. STAT. ANN. art. 5547-43 (1958) which provides, in part:

> When a Petition and the required Certificate of Medical Examination for Mental Illness are filed, the county judge shall set a date for a hearing to be held within thirty (30) days of the filing of the Petition, and shall appoint an attorney ad litem to represent the proposed patient.

[55] TEX. REV. CIV. STAT. ANN. art. 5547-15 (1958). In 1967, the legislature set a $40 limit per patient for the total cost of representation and other services. *Id.* arts. 5547-13, 5547-14; TEX. REV. CIV. STAT. ANN. 3930 (b) 1 B(1)(a)(v) (Supp. 1972-73). However, art. 3930 (b)1 B(1)(a)(v) may be in violation of the Texas Constitution because of a procedural defect in the passage of this section.

[56] TEX. REV. CIV. STAT. ANN. art. 5547-45 (1958).

[57] TEX. REV. CIV. STAT. ANN. art. 5547-48 (1958).

[58] Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424, 427-31, 445, 450 (1966).

[59] *Id.* at 427-31, 445.

[60] *Id.* at 427-31.

Interviews with attorneys further revealed two major reasons for their minimal efforts on behalf of their clients: first, the trivial fee; second, the attorney's belief that the question of commitment was essentially for the doctors to decide. The attorneys believed they should defer to psychiatric opinion on the substantive question of commitment and limit themselves to ensuring that all the papers were in order. They did not regard themselves as advocates for the patient's desires.[61]

D. Memphis, Tennessee[62]

The Tennessee civil commitment statute provides that if the person facing commitment has not hired an attorney and others have not hired one on such person's behalf, the court shall appoint counsel.[63] Any attorney, appointed or retained, may ask for a 5-day continuance to prepare the client's case.[64] At the time we visited Memphis in July 1972, the committing court had implemented the statute by appointing Assistant County Attorney Richard Crawford in all cases. Except for the few hours he devoted to commitment cases, Mr. Crawford spent the rest of his time defending the county in civil cases. Assignments were formally made at the hearing itself, though Mr. Crawford received notice of his appointments a few days prior to the hearings.[65]

The court held commitment hearings twice weekly in the county courthouse from about 11:30 a.m. to noon. An average of 10 commitment cases a week were heard by two rotating probate judges during the one-half hour that was allotted. Despite the burden of representing almost 500 persons annually, Mr. Crawford explained that the commitment hearings took little of his time because his only duties were to ensure that the person was not being "railroaded" and that all the papers were in order.[66]

---

[61] *Id.* at 445, 450.

[62] The following description is based upon personal observation and interviews which took place during July 1972. Interviewed were Richard Crawford, Shelby County Assistant County Attorney who in his official capacity represented persons facing involuntary commitment; Judge Polk, one of two probate court judges who handle civil commitment cases in Memphis; and staff persons working for the county social services department.

[63] TENN. CODE ANN. § 33-604(c) (Supp. 1972) provides, in part:

> An opportunity to be represented by counsel shall be afforded to every individual whose hospitalization is applied for under the provisions of this section and if neither he nor others on his behalf provide counsel, the court shall appoint counsel. At the request of any counsel so appointed, the court shall grant a recess of not more than five (5) days to give counsel an opportunity to prepare his case and may grant such a recess at the request of counsel provided by the individual or by others on his behalf.

[64] *Id.*

[65] Interview with Richard Crawford in Memphis, July 7, 1972.

[66] Crawford Interview, *supra* note 65.

To perform these tasks, Mr. Crawford generally found it unnecessary to talk with the persons facing commitment, the doctors, or anyone else. In most cases, prior to the hearing he merely read over the admission forms to determine if an "adequate complaint" was stated. Mr. Crawford explained that only rarely did reading the complaint lead him to suspect that it was inadequate. In these cases, Mr. Crawford talked with the examining doctor about the possibility that the petitioner, generally a spouse or other relative, sought commitment out of anger or spite.[67]

The format of the hearings differed with each judge. Regardless of the judge, however, a doctor, the patient, and Mr. Crawford were always present. At the hearings observed, the judge himself asked a few questions of each of the participants. Mr. Crawford's only participation was to tell the judge, when asked, his opinion of whether the client needed treatment. In each case observed, Mr. Crawford agreed with the findings of the doctor, even when the people he represented objected to commitment.[68] Mr. Crawford stated that he generally agreed with the doctor's recommendation.[69]

E. Chicago, Illinois[70]

The Illinois civil commitment statute provides that the public defender must be appointed at the commitment hearing for indigent persons who have not retained private counsel.[71] The statute also contains broader language indicating that in all events each person must be represented by counsel, and sets out certain rights of attorneys: counsel must be allowed time for adequate preparation; must be permitted to confer with her client at reasonable times; and must be allowed to make a reasonable investigation of the issues and a presentation of relevant evidence.[72]

---

[67] *Id.*

[68] Observations of hearings before Judge Polk, July 7, 1972. *See* Note 62 *supra.*

[69] Crawford Interview, *supra* note 65.

[70] The following description is based upon personal observation and interviews which took place in June 1972. Interviewed were Marc Collens, the public defender assigned to mental health cases; Judge Joseph Schneider, one of three judges who handled civil commitment cases in Cook County; Jerome Goldberg, Special Counsel for the Illinois Department of Mental Health; and staff persons working for Chicago State Hospital. Judge Schneider's views on the commitment process are set forth in a recent article he has written. Schneider, *Civil Commitment of the Mentally Ill*, 58 A.B.A.J. 1059 (1972).

[71] ILL. ANN. STAT. ch. 91½, § 9-4 (Smith-Hurd Supp. 1972) which provides, in part:

> At any hearing under this Act, the court shall . . . require that . . . in all events each person is represented by counsel . . . . 1) If the court determines that the person asserted to be . . . in need of mental treatment is indigent, the court shall appoint as counsel the public defender, if available. 2) If the public defender is not availble, the court shall appoint as counsel an attorney at law licensed by this state. 3) Upon the filing with the court of a verified statement of legal services rendered by the attorney appointed for the indigent person pursuant to paragraph (2) of this Section, the court shall allow as attorney fees, and order the county treasurer of the county where the hearing is held to pay to appointed counsel, a reasonable fee stated in the order, not to exceed $75.00 if not jury, or not to exceed $150 when there is a jury.

In 1972, when we visited Chicago, the Public Defender's Office of Cook County, which represented all persons facing commitment, had 5 divisions, 77 lawyers, and 2 investigators.[73] Of the 77 lawyers, however, only one was assigned to civil commitment hearings.[74]

The public defender attorney assigned to commitment cases, Marc Collens, represented 40 to 60 patients a week and between 2,000 and 3,000 patients a year. Each of three judges, rotating weekly through the mental commitment cases, routinely appointed Mr. Collens on the day of the hearing to each person scheduled for a hearing.

The hearings were held alternately at two of the several mental hospitals in Chicago.[75] Mr. Collens attempted to talk with each patient for about 5 minutes shortly before the hearings began, though even this was not always possible. He usually explained to patients that he was an attorney who wanted to help them and then asked if they would like to stay in the hospital or to leave. Many of the patients were unsure, but Mr. Collens provided little further explanation of the alternatives. Of those who wanted to leave the hospital, he asked where they planned to go and what they planned to do. Mr. Collens attempted to determine from these short discussions whether the person should be hospitalized. These discussions assisted him in determining how to conduct the hearing. He generally undertook no other prehearing investigation.[76]

The hearings observed were attended by a judge, a state's attorney, the public defender, the patient, a hospital doctor, a hospital social worker, and, in some instances, a friend or relative of the patient. The state's attorney generally asked questions of the doctor, social worker, and friend or relative; the public defender cross-examined them; and the judge occasionally asked questions. In every case the patient was required to testify at some point. The hearings varied greatly in length from 5 minutes to almost 40 minutes. Most cases lasted 10 to 20 minutes. The longer cases involved a vigorous defense by the public defender conducted primarily through extensive, though spontaneously generated, cross-examination of the hospital doctor. The judge normally ruled as the doctors requested, but occasionally ordered a disposition contrary to their recommendation.[77]

---

[72] *Id.*

[73] Interview with Marc Collens in Chicago, June 7, 1972. The public defender's office was once an autonomous body under the scrutiny of the Cook County Board of Commissioners and dependent on county fundings. Recently the office has been placed under the supervision of the judiciary in Cook County, specifically the Chief Judge of Cook County, while remaining dependent on the county for funds.

[74] *Id.*

[75] *Id.*

[76] Interview with Marc Collens and observation of Mr. Collens preparing for hearings at Chicago State Hospital, June 9, 1972.

Mr. Collens, while observed, did not invoke his statutory rights to "adequate" time to prepare and investigate the case of his clients, but claimed in interviews that his caseload was too heavy to permit such investigation. Even without time for advance preparation, he did advocate the release of his clients, though he appeared to press less vigorously for those clients whom he believed needed hospitalization, even if the client wanted her freedom. Mr. Collens neither believed that commitment was purely a medical question nor did he simply defer to the opinion of the hospital psychiatrists.[78]

F. *Cleveland, Ohio*[79]

The Ohio civil commitment statute does not require that a person facing involuntary commitment be represented by an attorney, although the person has a right to retain counsel and the court "may" appoint an attorney for the person.[80] The legislature has established no agency for representing mentally ill persons, has provided no funds for paying appointed counsel, and has defined none of the duties of counsel, retained or otherwise.[81]

In most of Ohio, committing courts do not choose to appoint counsel. In Cleveland, the Legal Aid Society has created a subdivision, not dependent upon state funds, to represent patients in mental hospitals who request representation. Their assistance extends beyond commitment proceedings. Indeed, commitment matters comprise less than one-half of the subdivision's caseload. The attorneys aid patients in other problems such as divorce, child custody, landlord-tenant relations, social security matters, and patient-staff disputes.[82]

---

[77] Observation of hearings before Judge Joseph Schneider at Chicago State Hospital and Illinois State Psychiatric Institute, June 7-9, 1972.

[78] Interview with Marc Collens and observation of Mr. Collens in hearings before Judge Joseph Schneider at Chicago State Hospital and Illinois State Psychiatric Institute, June 7-9, 1972.

[79] The following description is based upon personal observation and interviews which took place in June 1972. Interviewed were Robin Kennedy, attorney in charge of the Hospital Service Project of the Cleveland Legal Aid Society; Jim Ciocia and Gus Rini, staff attorneys of the Project; David Strand, an attorney for the Cleveland Legal Aid Society who developed the Hospital Service Project in Cleveland and is assisting other legal aid societies develop similar programs for the mentally ill; and staff persons working for the Fairhill Mental Health Center. *See also* Strand, *Legal Aid for Patients in State Mental Institutions*, *supra* note 32.

[80] OHIO REV. CODE ANN. § 5122.15 (Page 1970) which provides:

> The individual named in the affidavit shall be notified by the court of his right to secure counsel. The court may appoint, at any time in the proceedings, an attorney to represent a person who is alleged to be mentally ill.

[81] *Id.*

The mental health subdivision of the Legal Aid Society, called the Hospital Services Project, has offices in each of the four state mental hospitals in Cleveland. In 1972, when visited, the project was staffed by three full-time attorneys and a law student. Under normal circumstances, a social worker and several additional law students are also on the staff. The subdivision operated on an annual budget of approximately $50,000, and the caseload per lawyer ranged from 200 to 300 cases a year.[83] The head attorney, Robin Kennedy, believed that the project was servicing as many patients as the attorneys could represent effectively. More attorneys were needed, however, since of the 2,000 patients in the four hospitals, the project was representing only about one-half of those who objected to commitment and reaching an even smaller percentage of patients with other problems.[84]

Mr. Kennedy and the other attorneys saw themselves as advocates for whatever course of action the patients chose. However, the attorneys felt "blocked" from providing effective representation at commitment hearings by an "antiquated" commitment code that failed to provide for independent psychiatric examinations and by the "hostility" of the hospital administrators to the legal aid service. Mr. Kennedy also believed that effective legal representation at commitment hearings was hampered by the presence of only two probate referees. He explained that his attorneys were thus forced to advocate "unevenly" for clients in order to retain credibility with the referees.[85]

Further problems were caused by the process by which clients came to legal aid. The court played no role in appointing the legal aid attorneys to represent patients in the commitment hearings, and the attorneys did not systematically contact all patients to learn whether they wanted representation. To make their presence known to patients and hospital staff, the Project posted notices in wards that explained the patient's right to legal representation and the availability of legal aid. Patients often waited until the day scheduled for the hearing to request counsel. The late requests often lengthened a patient's stay because the attorney had to obtain continuances, generally granted by the referees, in order adequately to investigate alternatives and otherwise prepare for the hearing.[86]

---

[82] Interviews with Robin Kennedy and Jim Ciocia in Cleveland, June 12, 1972, *supra* note 79.

[83] *Id.*

[84] *Id.*

[85] Interview with Robin Kennedy in Cleveland, June 13, 1972.

Referee hearings, when held in the absence of counsel, were typically attended only by the referee and the patient. A state's attorney was never present. The Project, when representing a patient, routinely subpoenaed the hospital doctor and social worker assigned to the patient. The attorneys examined the doctor, hospital social worker, patient, and sometimes friends and relatives of the patient at the hearing in attempting to gain the release or alternative placement of a client. The attorneys interviewed believed that in most cases the referee simply followed the doctor's recommendation.[87]

G. New York State

Under New York statute, the obligation to appoint counsel for persons facing civil commitment is limited to indigents and even then is not mandatory.[88] In *People ex rel. Woodall v. Bigelow*,[89] however, the New York Court of Appeals held that persons facing commitment have a constitutional right to representation by counsel. Today counsel appears to be regularly provided in most parts of the state.[90]

The New York statute provides for compensation of assigned attorneys at a rate not exceeding $15 per hour for time expended in court and $10 per hour for time reasonably expended out of court. The attorneys are also to be reimbursed for expenses reasonably incurred. Total compensation per case, however, cannot exceed $300.[91] In all parts of the state, counsel is furnished through agencies called the Mental Health Information Service (MHIS),[92] but considerable differences exist among the various services.

The MHIS was created in 1965 to ensure that mental patients are accorded due process of law.[93] The statutory duties[94] of the MHIS include: (1) informing patients of procedures for admission and retention; (2) informing patients of their rights, including the right to have a judicial hearing, to be represented by counsel, and to seek independent medical opinion; (3) providing services and assistance to patients as may be required; and (4) in any case before the court, assembling and providing the court with all relevant information.

---

[86] Kennedy Interview, *supra* note 85.

[87] Interviews with Robin Kennedy and Jim Ciocia in Cleveland, June 12, 1972, *supra* note 79.

[88] N.Y. JUDICIARY LAW § 35 1. a. (McKinney 1968) which provides:

> When a court orders a hearing . . . in a civil proceeding to commit or transfer a person to or retain him in a state institution when such person is alleged to be mentally ill . . . the court may assign counsel to represent such person if it is satisfied that he is financially unable to obtain counsel.

[89] 20 N.Y.2d 852, 231 N.E.2d 777 (1967).

[90] Interview with Simon Rosenzweig, *infra* note 96.

[91] N.Y. JUDICIARY LAW § 35(2) (McKinney 1968).

[92] The MHIS was established by N.Y. MENTAL HYGIENE LAW § 88 (McKinney 1971).

The MHIS operates in four separate units, corresponding to the four administrative departments of the court system in New York State. The Presiding Justice of the Appellate Division of each department has the authority to appoint and remove MHIS staff and to promulgate rules and regulations to guide the MHIS in performing its statutory duties.[95]

The description that follows sketches the operation of the MHIS in the two judicial departments that include New York City and the adjacent counties.

1. The First Judicial Department[96]

Discussion of the First Judicial Department of New York, which covers Manhattan and the Bronx, is lengthy because the system of representation is complex. The hospitals within the department, which include Bellevue Hospital, contain about 7 percent of the 47,000 resident mental patients in the state. However, these hospitals accept over 25 percent of the 38,000 persons annually admitted to New York mental hospitals. In the First Department very few private attorneys are assigned to represent persons facing commitment. Rather, attorneys on the staff of the MHIS[97] represent most patients at commitment hearings as one of many services the MHIS provides patients.

---

[93] *See* Special Committee to Study Commitment Procedures of the Association of the Bar of the City of New York in cooperation with Cornell Law School, Mental Illness and Due Process Report and Recommendations on Admissions to Mental Hospitals under New York Law (1962).

[94] The statutory duties of the MHIS as of January 1, 1973, are set forth in N.Y. MENTAL HYGIENE LAW § 29.09(b) (McKinney Supp. 1972-73).

[95] *Id.*

[96] The following description is based upon personal observation and interviews which took place in June 1972. Interviewed were Simon Rosenzweig, Director of the Mental Health Information Service (MHIS); attorneys on the staff of MHIS; and staff persons working for Bellevue Hospital. The Mental Health Information Service has been written about extensively. The following articles are all helpful for those interested in further study of the Mental Health Information Service: Brown, *Lawyers and Psychiatrists in the Court: Afterword*, 32 MD. L. REV. 36 (1972); Gupta, *New York's Mental Health Information Service: An Experiment in Due Process*, 25 RUTGERS L. REV. 405 (1971); Kumasaka, "Process of Involuntary Hospitalization" (unpublished article) and *The Lawyers Role in Involuntary Commitment—New York's Experience*, 56 MENTAL HYGIENE 21 (1972); Kumasaka, Stokes & Gupta, *Criteria of Involuntary Hospitalization*, 26 ARCHIVES OF GENERAL PSYCHIATRY 399 (1972); Kumasaka and Stokes, *Involuntary Hospitalization: Opinions and Attitudes of Psychiatrists and Lawyers*, 13 COMPREHENSIVE PSYCHIATRY 201 (1972); Rosenzweig, *Compulsory Hospitalization of the Mentally Ill*, 61 AM. J. OF PUBLIC HEALTH 121 (1971); Zitrin, Herman, & Kumasaka, *New York's Mental Hygiene Law—a Preliminary Evaluation*, 54 MENTAL HYGIENE 28 (1970), and Note, *The New York Mental Health Information Service: A New Approach to Hospitalization of the Mentally Ill*, 67 COLUM. L. REV. 672 (1967). The complete works of Kumasaka, Gupta, Stokes, and Sharma are found in, "Final Report: Evaluation of Mentally Ill—Civil Commitment Problems," May 1971 (Unpublished report under National Institute of Mental Health, Public Health Service Grant MH 16485). The Institute is in Bethesda, Maryland.

The MHIS of the First Department has been staffed with both attorneys and social workers. As of the summer of 1972, 16 attorneys and 2 social workers staffed this MHIS, which operates on an annual budget of about $400,000.[98] In the First Department, and only in this department, the presiding justice has issued regulations which permit staff attorneys to represent patients at commitment hearings. The MHIS in this department thus serves a difficult, indeed disturbing, dual role: it performs the statutorily required function of providing information and recommendations to judges as advisors to the court and it performs the permitted but not required function of providing staff attorneys who serve as advocates at hearings.[99]

Current New York law permits an initial commitment of patients without a court hearing.[100] The courts normally become involved through habeas corpus proceedings or proceedings to hold patients beyond the initial commitment period allowed and at statutorily required periodic hearings thereafter. MHIS involvement with the commitment of a patient can begin at any time after the initial admission. The statute provides both for notice to the MHIS that the patient has been admitted and notice to the patient that the MHIS is available. Observations in June 1972, of the MHIS staff at Bellevue revealed that staff attorneys visited the psychiatric wards almost daily to inform individual patients of their rights and to determine whether these patients objected to hospitalization. On these ward visits the attorneys received complaints about treatment within the hospital, about various aspects of commitment, and occasionally about problems outside the hospital. Despite the daily ward visits, the staff workload frequently prevented MHIS attorneys from reaching patients immediately after admission.[101]

---

[97] Interview with Simon Rosenzweig, in New York City, June 12, 1972.

[98] N.Y. MENTAL HYGIENE LAW § 29.09(b) (McKinney Supp. 1972-73).

[99] *Id.* In preparing reports for the court, the MHIS attorneys seemed to us caught in a conflict between their duties as advocate for the client and their duties as advisor to the court. If a client in a criminal case reveals damaging information to her attorney about the offense, the attorney is obligated to retain the information in confidence. Within MHIS, the attorney may feel a similar duty to retain in confidence information revealed by the client but feel trapped by a conflicting duty to reveal that information as advisor to the court.

[100] N.Y. MENTAL HYGIENE LAW §§ 31.27, 31.37, 31.39 (McKinney Supp. 1972-73).

The attorneys found that determining whether a patient objected to hospitalization was often a difficult task. Some patients were only partially "in contact" during interview attempts. Other patients did not know whether they wanted to be released and were easily persuaded to adopt any course of action suggested. The job of the attorneys observed was made more difficult by the high level of noise and movement in the wards.[102]

For each patient facing continued hospitalization, whether the patient objects to hospitalization or not, the MHIS prepares and submits to the committing court a report containing "all relevant information" about the patient.[103]

Inspection of several reports prepared by the MHIS for patients who objected to continued hospitalization revealed that each of the reports, which averaged four to five pages in length, contains the following information: (1) the recommendation of the hospital psychiatrists; (2) the events leading up to hospitalization; (3) the background of the patient, including any prior hospitalization; (4) any evidence relevant to whether the patient was "dangerous" to either herself or others; and (5) a statement as to what the patient was likely to do and where and with whom she would live if released. MHIS attorneys interviewed described the reports as comprehensive, but also as presenting the facts in a manner most favorable to the patient.[104]

The factual investigation undertaken by the MHIS attorneys, aided by the staff social workers, includes: (1) interviews with the patient; (2) interviews with those who brought the patient to Bellevue; (3) interviews with the examining psychiatrists; (4) interviews with those to whom the hospital staff had spoken for information about the patient; (5) where appropriate, interviews with friends, relatives and employers of the patient; (6) examination of hospital records and attempts to establish the accuracy of the facts contained therein; and (7) a search for and examination of alternatives to commitment—both formal programs providing inpatient or outpatient care and informal placements with family or friends with whom the patient could live.[105]

---

[101] Interview with staff attorneys and observation of staff attorneys at work at Bellevue Hospital, June 27, 1972.

[102] *Id.*

[103] Interview with Simon Rosenzweig, in New York City, June 26, 1972.

[104] Interviews with staff attorneys at Bellevue Hospital, June 26, 1972.

[105] Interview with Simon Rosenzweig and staff attorneys at Bellevue Hospital, June 26, 1972, as well as observation of staff attorneys at work, June 27, 1972.

For patients who object to hospitalization the prehearing tasks of the MHIS attorneys, in addition to the above investigative work, include discussion with each patient's doctor in order to find a placement that is satisfactory to both the patient and the doctor. Most patients who initially object to continued hospitalization have their cases settled without a court hearing.[106]

The MHIS attorneys make use of prehearing settlements not only as an avenue through which release of patients can be obtained, but also as a means of gaining the voluntary admission of patients. The MHIS staff interviewed did not invariably seek the release of each of the several hundred patients who annually object to continued hospitalization. Rather, through the factual investigation, the attorneys attempt to determine what is in the best interest of the patients. Thus, a staff attorney advises a patient to accept voluntary hospitalization if the attorney believes that the patient needs hospitalization. Patients who refuse the advice of MHIS attorneys to become voluntary patients and who continue to desire release receive both representation at the hearing and continued representation by the MHIS.[107]

Generally, hospital psychiatrists prefer to settle a case, in part because of the time it takes to testify at commitment hearings. The doctors also dislike testifying in their patient's presence that the patient needs to be committed.[108] As one Bellevue psychiatrist explained, such testimony places the doctor in the role of "a punitive, chastising figure, the bad guy, the jailer of the patient," a role he considered detrimental to the doctor-patient relationship.[109]

At Bellevue Hospital, when no prehearing settlement can be arranged for objecting patients, a commitment hearing is held at a courtroom in the hospital. Fewer than 100 commitment hearings take place each year. The usual participants in the hearing are a judge, an MHIS attorney, a Bellevue staff psychiatrist, and the patient. Other frequent participants include family members, friends, private attorneys, and independent psychiatrists. The hearings at Bellevue are informal in manner and average 16 minutes in length, though considerable variation occurs depending upon the problems presented. Normally the hearings include cross-examination of psychiatrists by the MHIS attorneys. The court record for each case normally consists of the hearing transcript, the written report of the MHIS, and a certificate recommending commitment signed by two physicians.[110]

---

[106] Interview with Simon Rosenzweig, in New York City, June 26, 1972.

[107] Interview with Simon Rosenzweig and staff attorneys at Bellevue Hospital, June 26, 1972.

[108] Interview with staff psychiatrist at Bellevue Hospital, June 27, 1972.

[109] *Id.*

At the Bellevue hearings, MHIS attorneys are successful in obtaining the release of about one-fourth of the patients they represent.[111] Analysis by others[112] of the MHIS representation, however, indicates that the attorneys do not disagree with the psychiatrists on any issue in nearly one-half of the hearings and that in about one-fifth of the cases the attorneys convey an impression that they believe hospitalization would be best. Such data would lend support to a conclusion that MHIS attorneys persist in advocating what they perceive to be the best interest of their client, rather than pressing for the client's own view of her self-interest. However, Mr. Rosenzweig, the director of the department, and attorneys interviewed on the staff believed that this data resulted from attorneys, after careful factual investigation, simply finding no facts upon which a defense could be based. Mr. Rosenzweig maintained that at the hearings his staff attorneys always represented their clients' expressed desires, but that for some clients there were simply no facts to bring forward in support of their positions.[113]

2. The Second Judicial Department[114]

The Second Judicial Department of New York encompasses several counties near New York City and all of the city itself except Manhattan and the Bronx. Within this department are over 70 percent of the "resident" patients in the state, though a considerably lower percentage of annual admissions. The Mental Health Information Service of this department has a staff of 26 attorneys and an annual budget of approximately $600,000.[115] Its director, Alfred Besunder, nonetheless believes that he is understaffed both in terms of the number of attorneys and in the total absence of social workers from the staff.[116]

Although the responsibilities defined by statute[117] are the same for the MHIS in the First and Second Departments, they perform in practice markedly different roles and have differing conceptions of their functions. Unlike the attorneys in the First Department, those of the

---

[110] *Id.*

[111] *Id.*

[112] *See* Kumasaka, *The Lawyers Role in Involuntary Commitment, supra* note 96.

[113] Interview with Simon Rosenzweig in New York City, June 26, 1972.

[114] The following description is based upon interviews which took place in June and October 1972. Interviewed were Alfred Besunder, Director of the Mental Health Information Service (MHIS) in the Second Judicial Department of New York, and Irving Engel, a private attorney who is the head of the panel of attorneys who represent mental patients in Kings County.

[115] *See* note 114 *supra*.

[116] Interview with Alfred Besunder, in New York City, June 28, 1972.

[117] *See* note 94 *supra*.

Second Department do not represent patients at commitment hearings. The MHIS attorneys of the Second Department view themselves solely as officers and advisors of the court, whereas the First Department's attorneys are both officers of the court and counselors representing clients at the commitment hearings.[118] Moreover, interviews[119] revealed that the Second Department MHIS emphasizes providing general aid to patients with the myriad of problems that arise in the hospital and occasionally with problems outside the hospital, whereas the First Department considers work done for patients on the question of their commitment as its most important service. Regarding commitment, the attitudes of Second Department attorneys toward various aspects of involuntary hospitalization correlate to a much higher degree with those of psychiatrists involved in the commitment process than do the MHIS attorneys of the First Department.[120]

In the Second Department, court-appointed private attorneys represent patients at the commitment hearings. The procedure by which attorneys are appointed varies from county to county within the Second Department. Mr. Besunder considered the procedure for Kings County to be commendable for its systematic approach. Assignments there are made from a panel of volunteer attorneys set up by the Brooklyn Bar Association. The head of the panel is in charge of distributing assignments, although the judge makes the formal assignment. The panel head attempts to distribute assignments to attorneys on the panel three cases at a time in order to minimize attorney trips to the hospital and make more efficient use of the attorneys' time.[121]

---

[118] This difference, a result of different regulations promulgated by the chief judges of the departments, is discussed in Kumasaka & Stokes, *Involuntary Hospitalization, supra* note 96. Mr. Besunder, Director of the MHIS of the Second Judicial Department, is attempting to have the regulations of the Second Department changed so that MHIS attorneys can represent patients. He thought, however, that a special section of the MHIS should be created solely to represent patients at commitment hearings. He felt such a system would prevent what he saw as a conflict of interest for an attorney acting as both officer of the court and attorney for the client. Interview with Alfred Besunder in New York City, June 28, 1972.

Mr. Rosenzweig, Director of the MHIS of the First Judicial Department, believed that there was no conflict of interest in staff attorneys both representing patients and being officers of the court. He thought that this situation was no different from that faced by any attorney in court representing a client, since all attorneys are considered officers of the court. Interview with Simon Rosenzweig, in New York City, June 28, 1972.

Mr. Besunder did make it clear that if faced with a choice between relying only on private attorneys or relying solely upon the MHIS, he would choose the MHIS. Interview with Alfred Besunder, in New York City, June 28, 1972.

[119] Interviews with Simon Rosenzweig and Alfred Besunder, *see* note 96 & note 114.

[120] *See* Kumasaka, *The Lawyer's Role in Involuntary Commitment, supra* note 96.

[121] Telephone interview with Alfred Besunder, October 3, 1972.

Throughout the Second Department, attorneys are appointed when the court receives notice that the patient has requested a hearing. This practice leaves only a few days for attorneys to prepare, since hearings are scheduled within 5 days from the hearing request. Attorneys actually have more time to prepare, however, because hearings are often adjourned 1 or 2 weeks, and occasionally longer. As the appointed attorneys view their role, their task is essentially limited to becoming familiar with the facts and presenting the case in court. The staff of the MHIS is primarily responsible for the factual investigation as well as discussions with doctors. Furthermore, if important questions of law or new alternatives arise at the hearing, the judge typically will assign the MHIS attorney rather than the private attorney to investigate the problem and submit a brief to the court.[122] Irving Engel, who headed the appointments panel in 1972, and who represents patients himself, explained that typically the prehearing tasks of the appointed attorney require 1 to 2 hours of work. The attorney normally interviews the patient, reads the hospital records and the MHIS report, discusses the case with the MHIS attorney who wrote the report, and discusses the patient's problem with a member of his family.[123]

In each county of the Second Department a small group of attorneys receive most of the appointments, a practice which, Mr. Besunder believes, allows the attorneys to develop the expertise necessary to provide effective legal representation. The MHIS takes two steps to ensure adequate representation by private attorneys. First, it includes an instruction sheet with each attorney's notice of assignment,[124] and second, its staff attempts to follow each case. If they believe an appointed attorney is not doing an adequate job, they will request that the court remove that attorney from the case and make no further appointments to him.[125]

---

[122] *Id.*

[123] Telephone interview with Irvin Engel, October 3, 1972.

[124] The instruction sheet reads: upon notification of appointment and his acceptance thereof, counsel should engage promptly in the matter assigned, bearing in mind that the civil liberties of a patient (client) are involved. For general guidance, the following steps are listed. These are not exclusive or limited nor necessarily set forth in sequence. It is advisable that counsel's duty should include, at the very minimum substantial effort in each of these steps: (1) Counsel should familiarize himself with Article V of the Mental Hygiene Law, particularly section 72; (2) *prior* to hearing, counsel should: (a) notify patient promptly of his assignment and interview patient (b) examine court papers, (c) examine patient's hospital file and medical records (familiarize himself with psychiatric nomenclature), (d) discuss patient's alleged mental condition (as well as physical condition) with treating or examining psychiatrist, (e) interview available members of patient's immediate family, relatives, friends or others who may shed some light on the patient's background and mental condition (past and present); (3) explore, *in depth*, all possible alternatives to hospitalization; and (4) discuss matters with Mental Health Information Service staff (with particular regard to treatment and item No. 3).

[125] Besunder telephone interview, *supra* note 121.

Attorneys, in accordance with state statute, are assigned to represent only persons whom the court is satisfied are "financially unable to obtain counsel." The court relies upon the MHIS to determine whether persons facing commitment meet the criteria for appointed counsel. The MHIS attorneys, as a routine matter, submit a financial report and recommendation on appointing counsel to the court with the hearing request. Mr. Besunder explained that the MHIS recommends that an attorney be appointed unless a patient has "substantial, available liquid assets." As an example of how this standard is applied, Mr. Besunder pointed out that the MHIS would recommend the appointment of counsel for a patient who owned a house but had virtually no cash or other liquid assets.[126]

V. The Lessons Derived From the Current Systems of Counsel

A. *Lessons About the Behavior of Counsel*

These eight descriptions of existing systems offer valuable clues for anyone seeking to devise a counsel system. In Arizona, Iowa, and Texas, the three described states that rely upon nominally compensated members of the private bar, neither of the principal determinants of effective counsel were fulfilled in the slightest degree. The attorneys did not in any way regard themselves as advocates and (partly as a consequence) failed to develop the knowledge or perform the work necessary to aid their clients. Indeed, they did virtually nothing except stand passively at a hearing and add a falsely reassuring patina of respectability to the proceedings. There is some reason to fear that the presence of counsel who does nothing is not merely of no use to her client but may in fact worsen the client's chances for release. The passive attorney may induce the judge to believe that she concurs with the judge's inclination to commit and thus free the judge from the restraint that may flow from believing herself solely responsible for the decision.[127]

We strongly doubt that the inadequacy of the counsel system in these three states is aberrant[128] or that merely informing the attorneys that they are expected to perform as advocates would alter their behavior. The problems with such systems of low-paid court appointments are inherent:[129] you get what you pay for. Worse, in civil commitment cases, the attorneys the state can obtain through the private bar will probably know almost nothing about mental health matters, share with the general public basic misconceptions about mental illness, and defer eagerly to the judgments of hospital psychiatrists, regardless of their client's desires. Nonetheless, we have also found some systems of appointments from the private bar may be workable. The Mental Health Information Service in New York's Second Judicial Department has apparently found that counsel appointed from the private bar will work for the interests of their clients when more adequately compensated and provided supporting services from staff members of the MHIS.

---

[126] *Id.*

[127] For an analogous observation in the juvenile field, *see* Cohen, *A Lawyer Looks at Juvenile Justice*, 7 Crim. L. Bull. 513, 522 (1971).

[128] The system in St. Louis, where counsel are paid $10 per case and behave in precisely the same fashion as they did in Arizona, Iowa, and Texas, provides further corroboration; *see* Dix, *supra* note 39.

[129] For discussions of the inherent flaws in uncompensated counsel systems in criminal cases, *see* Katz, *Gideon's Trumpet: Mournful and Muffled*, 55 Iowa L. Rev. 523 (1970)

The performance of systems that rely on counsel provided through legal services or comparable agencies is uneven but more promising. Memphis did not rely on nominally paid members from the regular bar but rather on a decently paid assistant county attorney who handled all cases—and it still offered a mere ornament as counsel.[130] Its system illustrates in part the problems of an overburdened caseload and the problems of using attorneys whose primary responsibility lies in other areas of the law. Most significantly, it shows that even using regularly a single attorney or small group of attorneys will not guarantee either that they will view themselves as advocates or that they will develop sufficient familiarity with mental health issues to form independent judgments about appropriate dispositions.

Chicago, where the public defender staff attorney did generally view himself as an advocate (for his own conception of the patient's best interests, if not always for the patient's own view), demonstrates the crippling impact of too great a caseload. The attorney, though dedicated, barely had time to meet his clients before a hearing and no time at all to investigate possible defenses or alternatives to hospitalization.[131] Cleveland's Legal Aid Society, generally zealous, avoided the problem of disastrously overloading its attorneys only by declining to handle the cases of many persons who needed assistance.[132] In New York's First Judicial Department and Cleveland, however, when attorneys had manageable caseloads, a vision of themselves as advocates, and moderately adequate time and supportive services, they did appear to provide substantial aid to persons facing commitment.[133]

In sum, though the survey is tenuous because the sample was small

---

and Williams & Bost, *The Assigned Counsel System: An Exercise of Servitude,* 42 Miss. L.J. 32, 38-45 (1971) (discussing the impact on the quality of representation provided the client).

[130] From interview with Richard Crawford, *supra* note 65.

[131] From interview with Marc Collens, *supra* note 78.

[132] From interviews with Robin Kennedy and Jim Ciocia, *supra* note 82.

[133] *See* notes 79 & 96 *supra.*

and hand-picked, it does seem to confirm what anyone might have guessed in advance: that no system can provide effective counsel unless the attorneys working within it view themselves as advocates and have the knowledge, time, and resources to expend adequate effort. It also illustrates that private practitioners asked to handle mental health cases are likely to view their responsibilities as attorneys more narrowly than they do in any of their other areas of practice, except perhaps when representing a juvenile or serving as a guardian or trustee. Though we have examined no system of counsel for mentally ill persons (and learned of none) which draws upon adequately compensated appointed attorneys while providing no guidance from a supervising agency, we suspect that simply offering the incentive of decent fees will not overcome most attorneys' inclination to defer to the judgment of examining psychiatrists or at most to act from their own conception of the client's best interest rather than the client's conception.[134]

B. Lessons About the Judges' Roles in Shaping Attorney Behavior

We have one further observation about the current counsel systems and the central determinants of a system of effective counsel. In each city we visited and in each city reported, judge and counsel seem to have developed a working relationship in which each appeared to act on a shared conception of the attorney's proper role. Judges did not either exhort counsel to be more active or chastise them for being too aggressive. This parallelism of attitude may, of course, be attributable simply to a high level of tolerance among judges for varying approaches of attorneys, but since within each city the attorneys seemed to behave in much the same manner, we think it more likely that counsel's behavior—the ardor of her advocacy—is shaped in part by her perception of the degree of ardor the judge will tolerate. In our own study, attorneys in Cleveland admitted that they advocated unevenly among their clients to preserve goodwill with the hearing referees.[135] More reliable proof of the judge's shaping role is provided by a recent important study of counsel in juvenile cases.

In this study by W. Vaughn Stapleton and Lee E. Teitlebaum,[136] attorneys of similar backgrounds instructed to behave as advocates were placed as counsel in juvenile courts in two large cities. In one city the judges had long accepted the lawyer's role as advocate for the juvenile's freedom and ran their proceedings much like those in an adult criminal court. In the other the judges clung to the model of the juvenile court as a cooperative venture, discouraged technical defenses and ran highly informal proceedings. The attorneys in this city, despite their strong view of their role as advocates, quickly adjusted to raising fewer defenses on their clients' behalves than were justly available to them.[137]

---

[134] *See also* Ennis, *Mental Illness*, 1969/1970 ANNUAL SURVEY OF AMERICAN LAW 29, 30 (1970); and Ennis, *Civil Liberties and Mental Illness*, 7 CRIM. L. BULL. 101, 126 (1971).

[135] From interviews and observation in Cleveland, Ohio, June 1972, *supra* note 79.

[136] IN DEFENSE OF YOUTH (Russell Sage Foundation 1972).

These attorneys cannot be said to have acted irresponsibly. They may well have served their clients' best interests by not angering the trial judge who bears vast discretion over a wide range of decisions. The point is that attorneys, even when funded adequately, given sufficient time to prepare, and instructed to behave as advocates, probably will fail to actively advocate for their clients in the face of hostile judges. The Stapleton-Teitlebaum study, conducted as it was after *Gault*, also illustrates that the mere articulation of constitutional rights by the Supreme Court will not necessarily (or even probably) affect the attitudes and behavior of trial judges long accustomed to a different mode of procedure. Thus, one lesson derived from the study is that any act to provide for an adequate system of counsel must seek to overcome judicial intransigence and create an atmosphere in which attorneys find themselves encouraged to perform their proper roles.[138]

VI. A Suggested System to Provide Effective Assistance of Counsel

A. Summary

From these observations of the disasters and successes among current systems flows our suggestion for a system of counsel which states might wisely consider adopting.

For flexibility and efficiency, we recommend the creation of a statewide umbrella agency, which we have labeled for convenience the Mental Health Advocacy Agency. The agency's sole task would be to establish and supervise systems of counsel throughout the state to represent all persons[139] facing civil commitment. In parts of the state with any

---

[137] *Id.* at 162.

[138] *Id.* at 138. See sections 7 and 8 of our proposed statute, in the Appendix to this article.

[139] We suggest that because the need for counsel does not depend upon indigency but, rather, on the prospect of commitment, all persons facing commitment should initially be provided counsel. The state can protect its financial resources by undertaking a determination of financial ability based on available liquid assets after counsel is provided. Those people able to afford counsel should then reimburse the state for the cost of counsel's services.

Our recommendation that counsel be furnished to all persons should not be construed as a desire to force representation upon people who do not want it. People should have the right to refuse counsel. A person alleged to be mentally ill should be permitted to waive her right even if it is believed that she is incompetent to make an intelligent decision. Before counsel withdraws, however, she should ensure that no improper coercion has been substantial number of commitment proceedings annually, full-time staff attorneys working for the agency, paid at the level of state attorney general staff members of comparable experience, would represent persons in proceedings. In other parts of the state, where commitments are fewer and full-time personnel prove economically infeasible, the agency would be authorized to hire part-time personnel, contract with legal aid or comparable groups, or engage members of the private bar paid at an adequate hourly rate, so long as the agency finds that the alternative assures effective assistance of counsel. The agency would offer any necessary training, retain social workers, advisory psychiatric counsultants, and appropriate paralegal staff, and ensure that counsels' caseloads are no greater than is consistent with performing the role of advocate. To resolve the confusion in many attorneys' minds over their responsibilities in commitment cases and to attempt to affect judges' attitudes toward the appropriate role of counsel, the statute creating the agency should affirm the attorney's role as that of advocate and detail some of the attorney's principal responsibilities.

Because merely detailing the attorneys' roles is unlikely to alter the behavior of committing judges long accustomed to informal, noncombative proceedings,[140] we recommend that legislatures require the presence of a state's attorney at all hearings to represent the state or the petitioners for commitment. Having opposing advocates present recreates the normal posture of common law courts, releases the judge to be the neutral decisionmaker, and helps free defense counsel from nagging feelings that he is somehow blameworthy if evidence of which he is aware that might increase the likelihood of commitment is not brought before the court.[141] As a second form of collateral legislation likely to improve the integrity of the proceedings, we also recommend that all proceedings be on the record by means of tape recordings or other transcription. (Even broader changes, for which we do not frame statutory language, might be appropriate. Among the most important of these would be to increase the amount of judicial time available for commitment hearings to encourage judges to be more receptive to spending an appropriate amount of time on each case.)

In many respects our recommendation mimics the structure of the Mental Health Information Service in New York, except that we have

---

employed by others to induce the allegedly ill person to refuse services. After counsel withdraws, the court must assume an even greater burden to assure that a sound disposition is made in the case.

[140] *See* discussion of study by Stapleton & Teitlebaum, text accompanying note 136 *supra*.

[141] Fred Cohen has also observed the role confusion caused for attorneys by the absence of an opponent. *See* Cohen, *supra* note 58, at 448.

stripped away the MHIS responsibilities as advisor to the court and created a purer advocacy agency. Our proposal thus bears an even closer resemblance to the public defender offices that are being established in many parts of the country to handle the defense of indigents in criminal cases.[142] Evaluations of the structure and services of public defender agencies have been generally favorable,[143] and reliance on such systems has gained a substantial measure of support from judges and the private bar.[144] Where we have varied from the standard model of the public defender office,[145] we have done so in response to the distinguishing features of proceedings for the mentally ill.

We believe that we have designed a flexible framework for providing counsel that maximizes the potential for effective assistance of counsel without maximizing costs. The financial costs of the system will not be inconsequential, but if, as in New York, attorneys help advance the state's own goal of avoiding unnecessary hospitalizations, the savings from reduced hospital costs should partially offset the costs of providing counsel.

B. Does the Constitution Require an "Effective System" of Counsel?

We wish we could also claim that a system of counsel as substantial as that recommended were the minimum tolerable under state and federal constitutions. Courts have, however, only rarely been asked to hold unconstitutional whole systems by which states provide counsel to indigents and have never been asked to do so, so far as we can determine, with regard to systems of counsel in civil commitment proceedings. In the context of criminal defense, Kentucky's Court of Appeals has recently held impermissible its state's system of uncompensated appointed counsel, in part on the ground that it is a taking from the attorney without just compensation and in lesser part on the ground of the impact on clients.[146] A federal district court in New York has similarly found that, as a class, untried jail inmates in Brooklyn were being deprived of their right to effective assistance of counsel because of the excessive caseload of the legal aid attorneys assigned to represent them.[147] We believe these decisions are sound. In the words of a very recent opinion of the United States Court of Appeals for the Fifth Circuit, states must provide "counsel reasonably likely to render and rendering reasonably effective assistance of counsel."[148] In the systems at issue in the Kentucky and New York decisions attorneys were unlikely to render reasonably effective assistance. Aggressive action by courts in dealing with ineffective counsel systems seems especially justified: courts would seem to be able to judge sensibly the quality of systems of counsel at least as well as, or perhaps better than, the merits of the many other social disputes they are asked to resolve.

---

[142] *See* Goldberg & Hartman, *Help for the Indigent Accused*, 30 N.L.A.D.A. 203, 207 (1972) (listing the many states that have developed public defender systems).

[143] *See* Comment, *Analysis and Comparison of the Assigned Counsel and Public Defender Systems*, 49 N.C.L. Rev. 705 (1971). For a more tempered evaluation, critical not of the system in theory but of the dangers of immense caseloads and inadequate funding, *see* Note, *The Right to Effective Counsel: A Case Study of the Public Defender*, 50 Denver L.J. 45, 84-87 (1973).

[144] *See The Echoes of Gideon and Reverberations of Argersinger: Legal Representation of Indigent Criminal Defendants in Alabama*, 25 Ala. L. Rev. 229, 277 (1972) (attorneys and judges in Alabama were polled about the system they favored for providing counsel to indigents. Forty percent preferred exclusive reliance on state or local defender systems. An additional 23 percent favored a local defender supplemented by appointed counsel).

[145] *See* National Defender Project, National Legal Aid and Defenders' Association, How to Organize a Defender Office (1967).

We do, however, understand the reluctance of courts to intrude on the prerogatives of legislatures especially where appropriations are required.[149] It is for this reason, and because only legislatures can establish and maintain stable agencies, that we have focused our efforts on developing model legislation. Legislatures should assume no less responsibility than the courts in enforcing the dictates of the state and federal constitutions. Statutory language embodying our recommendation [hereinafter cited as Draft] can be found in the appendix to this article. The impetus for many of its provisions should be self-evident in light of the descriptions of current systems and the functions we have delineated for effective counsel. In the next section we elaborate on a few of the more difficult (or at least less obvious) decisions that went into shaping our proposal.

---

[146] Bradshaw v. Ball, 487 S.W.2d 294, 298 (Ky. 1972) ("[I]t appears elemental that the public interest in the enforcement of criminal laws and the constitutional right of the indigent defendant to counsel can be satisfied only by requiring the state to furnish the indigent a competent attorney whose service does not unconstitutionally deprive him [the attorney] of his property without just compensation."). Other courts, however, have not only upheld the constitutionality of uncompensated counsel systems but have indicated that they are fully contented with the quality of work performed. *See In re* Meizlish, 387 Mich. 228, 238-41, 196 N.W.2d 129, 134-35 (1972); State v. Rush, 46 N.J. 399, 405-07, 217 A.2d 441, 444-45 (1966).

[147] Wallace v. Kern, 13 CRIM. L. REP. 2243 (E.D.N.Y.), *rev'd*, 481 F.2d 621 (2d Cir. 1973) (reversed on other grounds). For a discussion of this case and the context in which it arose, *see* Brown, *Legal Aid Walks Out; Calls for End to Cheap Justice*, II GUILD NOTES 1 (Aug. 1973).

[148] West v. Louisiana, 13 CRIM. L. REP. 2226 (5th Cir., May 1, 1973), *citing* MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960).

[149] *See, e.g.*, Jones v. Commonwealth, 457 S.W.2d 627 (Ky. 1970). (The court expresses its dissatisfaction with the Kentucky system of uncompensated appointed counsel in criminal cases but, also expressing its reluctance to overturn its earlier decisions, urges action by the legislature). Courts have been equally reluctant, for different reasons, to overturn convictions of criminal defendants because a particular attorney has provided ineffective assistance. *See* Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965).

VII. A MORE DETAILED EXPLANATION OF SOME CRITICAL ASPECTS OF THE PROPOSAL

A. *Why a Statewide Agency*

To administer the system for providing counsel, we have suggested a statewide agency supervised by the state supreme court. Our preference for a state agency instead of, for example, separate uncoordinated agencies in each county is motivated by several considerations: efficiency, in that a statewide system will more easily permit multiple-county units of representation and general resolution of common administrative problems; a higher probability of independence from the local judiciary, in that ardent advocacy seems more probable from attorneys whose jobs depend on an agency amply removed from the control of any local judge; and financial stability, in that financing through the state rather than the counties seems generally more likely to provide adequate levels of funding.[150]

Our recommendation that the agency be placed under the supervisory control of the state supreme court, rather than be wholly independent or administered through the state department of mental health, similarly derives from our desire to assure adequate funding and diligent advocacy. An independent agency might have the greatest freedom from political pressures but its very freedom may imperil its success in obtaining adequate legislative appropriations for a vigorous program. The state's department of mental health, while it might offer a potential for adequate funding, is likely to be hostile to persistent advocacy by persons who frequently disagree with doctors working in the department's hospitals.[151] State supreme courts may, on the other hand, offer both financial stability and support for the ethos of attorneys as advocates. In New York, the Director of the Mental Health Information Service of the First Department believed that placement of the agency under the supervision of the appellate division of the state court system achieved the maximally advantageous combination of funding, stature, and independence.[152] These are the critical determinants and if, in another state, some other placement can better serve than that which we have suggested, it should be used. It is possible, for example, that an agency could function best as an autonomous division of a public defender system that also provided assistance to criminal and juvenile defendants. This approach has been adopted with apparent success in the District of Columbia,[153] but has not worked well in Chicago.[154]

---

[150] Marc Collens, the Public Defender Attorney in Chicago, believed that the Cook County Public Defender Office was chronically underfunded and subject to local political pressures because it is controlled at the local level. *See* notes 70 & 143 *supra*.

[151] David Strand of Cleveland's Legal Aid believed that bureaucracies such as state mental health departments are rarely able to protect the patient's rights even when they purport to try. He pointed out that a patient advocate and ombudsman hired by one Cleveland hospital had proven ineffective in protecting patients' interests. *See* interview with David Strand, note 79 *supra*. *See also* the ambivalent experience in the District of Columbia with a mental hospital ombudsman. Broderick, *One-Legged Ombudsman in a Mental Hospital: An Over-The-Shoulder Glance at an Experimental Project*, 22 CATH. U.L. REV. 517 (1973).

B. Why a Preference for Full-Time Attorneys

Under the draft, the agency is required to rely on full-time attorneys except where another system offers substantial advantages in terms of financial costs while adequately assuring the availability of effective counsel. Many of our reasons for preferring full-time staff attorneys should now be obvious from discussions of the inadequate performance of court-appointed attorneys from the private bar.[155] By contrast, attorneys who work full time are likely to have been attracted to the work by a preexisting concern for mentally ill persons and perhaps an awareness of their problems. They are more likely to have the time and professional incentive to become informed about mental health issues and thus be able to earn the trust of clients, doctors and judges. Staff attorneys for the Mental Health Information Service in New York seem, for example, to have gained the respect of judges and many hospital staff and to have been able through that trust to affect favorably many dispositions for their clients.[156]

Agency attorneys are also free from the pressures that private attorneys may feel to serve their higher paying clients first and reserve their "spare" time for clients for whom they receive less compensation. This is especially true in the context of civil commitment because private attorneys are generally unlikely either to seek the esteem of their clients at the mental hospital or to rely on this lower compensated service as an entree into fee generating work for others impressed by their handling of mental health cases. Moreover, private attorneys, because of the burdens of traveling to often distant state hospitals, are likely to be less accessible to patients committed in advance of their hearings. Staff attorneys, such as those in New York, Cleveland, and Chicago, maintain offices in the hospitals themselves.

---

[152] From interview with Simon Rosenzweig, note 96 *supra*.

[153] *See* note 40 *supra*.

[154] From interview with Marc Collens, note 70 *supra*.

[155] *See* Part IV *supra*.

[156] From interviews with hospital staff, MHIS attorneys, and a judge. *See* note 96 *supra*. *See also* Broderick, *Justice in the Books or Justice in Action—An Institutional Approach to Involuntary Hospitalization for Mental Illness*, 20 CATH. U.L. REV. 547, 628-32 (1971).

A less obvious advantage of full-time attorneys is that they are often likely to cost less than other systems—not less than the cheapest system of nominally paid court appointments that the state might try to pass off as a system of counsel, but rather less than a system of appointed private attorneys who are compensated at a level likely to produce effective advocacy. Consider an example. Assume an urban area in which 1,000 people face commitment annually (in Detroit the number approaches 4,000). If an agency hired attorneys at a ratio of one for each 250 persons annually facing commitment, approximately the ratio found feasible in Cleveland,[157] then four full-time attorneys would be needed. If the average salary of staff attorneys is $16,000 a year, the cost to the state of their salaries will be $64,000 annually. Many other administrative costs must be added to this figure. If supporting staff, fringe benefits and operating costs are estimated at $50,000,[158] then the total cost to the state would be $114,000 annually. This amount is substantially less than a system of appointed private attorneys might cost the state. If private attorneys were reimbursed at a rate of $35 an hour, then assuming the average number of hours worked per case to be 7,[159] the cost of representation for these 1000 people would be $245,000 annually. Even if a rate of $20 per hour is adopted, the annual cost would be approximately $140,000. An agency with such a caseload can thus be expected to cost the state between $26,000 and $131,000 less each year than a system of court appointments.

In less populated areas[160] on the other hand, the use of full-time agency attorneys may not prove economically feasible. The use of appointed private attorneys or possibly an intermediate system short of full-time counsel, such as is set forth in the statutory appendix, may allow the state substantial financial savings while still assuring effective representation. If an area to be serviced has an average of only 60 people facing commitment annually, then the total cost of appointed private attorneys at an hourly wage of $35, again assuming an average of 7 hours work per case, is $14,700. If a wage of $20 per hour is paid, then the total cost will be only $8,400. Support through contracted services of a social worker and a consulting psychiatrist might cost an additional $4,000. If one full-time agency attorney is hired by the state, the annual salary alone, as previously assumed, might be $14,000 to $16,000. Support staff, fringe benefits and operating expenses might raise the total costs for a full-time attorney to $25,000 or even $30,000 annually. In such an area, private attorneys might thus cost many thousands less than a full-time agency attorney. As an alternative, a half-time attorney on the staff of the agency with proportional staff support might provide the optimally effective service at reasonable cost.

---

[157] *See* text accompanying note 83 *supra*. The "correct" ratio of attorneys to clients is difficult to determine. Beyond constitutional limits on caseloads consistent with providing a minimally adequate level of service, the appropriate "ratio" is basically a political question similar to the decision on the hourly rate for appointed attorneys. Because of the difficulty in determining a satisfactory ratio, the recommendation of this study is that the director of the agency assure that "the number of attorneys is adequate to provide effective assistance without overburdening any attorney."

[158] This is the operational cost of the Cleveland Mental Health Project which serves four hospitals. The figure includes the cost of a social worker, which should be considered separately since it will be an expense in any system recommended here. However, the project in Cleveland was given rent-free office space in the hospitals.

[159] This is a very rough estimate of how long it will take attorneys, on the average, to achieve effective representation. Part III, *supra*. Some persons for whom an acceptable placement is quickly arranged should take far less time; others will take far more.

[160] In the setting of criminal defense systems, one study has concluded that for areas of greater than 400,000 population the financial cost of a defender system will be less than a system of appointed counsel. 1 L. SILVERSTERN, DEFENSE OF THE POOR IN CRIMINAL CASES

Apart from its being economically disadvantageous in areas with small caseloads, a system of full-time counsel suffers at least one other possible shortcoming that must be acknowledged. Full-time attorneys, to sustain their credibility with judges, may feel compelled to represent their clients with unequal fervor, since, in order to increase their overall rate of success among all their clients, attorneys may press less diligently for clients whom the attorney believes are of a type the judge generally commits. Attorneys at Cleveland's Legal Aid Society admitted that this compromise with evenhanded advocacy had occured within their program.[161] This attribute of a full-time counsel system is disturbing, but the same problem exists in systems of appointed private counsel. Under systems of court appointments, particularly where the committing judge makes the appointments, any attorney who handles more than a handful of cases will be subject to comparable forces, while any attorney who handles only a few cases is likely to be ill-informed about mental health matters and available alternatives to hospitalization. On balance, we believe the many advantages that full-time counsel offers more than outweigh the dubious advantage in terms of independence that appointed counsel might offer.

IN AMERICAN STATE COURTS 63 (1965). In 1970, there were 74 standard metropolitan statistical areas in the United States with a population of 400,000 or more and 101 with 300,000 or more. *See* STATISTICAL ABSTRACT OF THE UNITED STATES—1972, at 837-97 (1972).

[161] *See* text accompanying note 85 *supra*.

C. *How Private Practitioners, When Used, Should be Appointed and Paid*

We have advocated relying on private practitioners to represent allegedly ill persons only when full-time staff attorneys are infeasible because of an area's small number of commitment proceedings. We have further suggested that even in circumstances in which private practitioners may be considered, at least equal consideration be given to part-time staff attorneys and contractual relations with local legal aid agencies and that the choice among systems be determined only in part in relation to costs. We expect, however, that under any system established, most states will rely, at least in some less populated areas, on practitioners from the private bar. Legislatures must thus devise a scheme for appointments and payments that will assure that such attorneys provide effective assistance.

In most systems of court-appointed counsel in criminal, juvenile, and mental health cases, the authority to appoint has resided with the judge before whom the attorneys appear. The power of appointment has been a source of much abuse, both in its use as patronage and as a method of securing attorneys "who will not make trouble."[162] Of course, whatever individual or agency controls appointments can engage in these abuses. As minimum protection we believe that appointments should be removed from the control of the committing judges and placed under an agency or bar committee that is not beholden to the judge. Under our proposed legislation, the statewide Mental Health Advocacy Agency would have responsibility for establishing a systematic and publicized system of assignments.

Of equal significance is the scheme of compensation for appointed counsel. The payment formulas in several observed jurisdictions that rely on court appointments guarantee ineffective representation.[163] In Austin and Phoenix, attorneys were paid $10 for each case; in Iowa, $15.50. Under such a scheme, the only way an attorney can break even is to do nearly nothing and do it in volume.

To provide an incentive for attorneys to prepare cases adequately, the state should adopt an hourly rate of compensation and abandon flat per-case rates. That much of the appropriate payments scheme is reasonably obvious. The difficult problem is how high an hourly rate to set. The ideal rate structure, if lawyers would not abuse it, would be a flexible system permitting attorneys to bill the state for commitment clients at the same rates they charge other clients. Because of the high fees many attorneys charge and legitimate fears about the possibilities for abuse, such an elastic provision seems out of the question as a political matter. If legislatures can be persuaded to compensate attorneys at some substantial portion of their normal rate, adequate representation can be realistically hoped for. To assure compensation sufficiently high to attract able attorneys and encourage careful work, we have suggested a rate of $25 per hour through 1976, after which the Director, with the approval of the supreme court may raise the rate up to a maximum of $40 per hour, if she finds such a higher rate necessary to encourage effective representation.

---

[162] Interview with Max Margulis, Director of the Patient Advocacy Legal Service, Washington University Law School, June 1972. *See* ABA SPECIAL COMM. ON MINIMUM STANDARDS FOR THE ADMINISTRATION OF JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 24 (Tent. Draft, 1967).

[163] Hunter, *Slave Labor in the Courts—A Suggested Solution*, 74 CASE & COM. 3, 8 (no. 4, 1969).

In addition to hourly compensation, the legislation should permit attorneys to be reimbursed for reasonable expenses incurred during the course of representation.[164] Under our proposed scheme, social workers and consulting independent psychiatrists would already be available through the state agency,[165] but long distance phone calls and travel costs may well be necessary to effective representation.

D. Why a Statutory Outline of the Lawyer's Duties

Today many people facing commitment receive inadequate legal assistance because attorneys believe that their responsibilities are fully discharged by ensuring that commitment papers are in order and that their clients are not being "railroaded" into the hospital by "scheming relatives." The Memphis assistant county attorney viewed these as his only duties,[166] as did most of the attorneys surveyed in the Iowa study.[167] In Austin, Texas, and Phoenix, Arizona, the typical appointed attorney merely checked commitment papers.[168] Counsel with such role concepts will offer ineffective legal assistance, regardless of statutory provisions. Because of this tendency of attorneys to adopt constricted roles, and because in the area of civil commitment, attorneys have essentially no tradition to rely upon, no experience, no training, and no adequate source to consult for guidance, it would be wise for the legislature to set forth the primary duties of counsel.[169] We have set forth in our Draft (see appendix, section 4) a suggested list that might be adopted.

---

[164] The federal government and most states provide by statute for reimbursement for appropriate out-of-pocket expenditures by appointed counsel in criminal cases. *See, e.g.*, 18 U.S.C. § 3006(A) (1970).

[165] Draft, § 3g (see appendix). The American Psychiatric Association has also recommended that persons facing commitment have available to them the services of independent psychiatric consultants. *Position Statement on Involuntary Hospitalization of the Mentally Ill*, 128 AM. J. OF PSYCHIATRY 1480 (1972).

[166] From interview with Richard Crawford, text at note 65 *supra*.

[167] *Contemporary Studies Project: Facts and Fallacies about Iowa Civil Commitment*, note 51 *supra*, at 913-23.

[168] Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, *supra* note 58, at 445, 450 (appointed counsel in Austin, Texas); and Wexler & Scoville, *supra* note 42, at 53 (appointed counsel in Phoenix, Arizona).

E. *Why Provisions to Encourage Dispositions Before Hearings Should be Included in the Statute*

Our draft statute prescribes as one of the duties of counsel that they meet with examining physicians in appropriate cases to determine whether a disposition satisfactory to the patient can be arranged without a hearing.[170] The Draft creates a corresponding duty on the part of the state department of mental health to insure that its own staff will meet with the agency attorneys.[171]

We have recommended such prehearing discussions in part to avoid the trauma caused for many patients by the testimony of family members and others at formal hearings[172] and in part because a prehearing settlement avoids for attorney and client the uncertainty of a judge's rulings. We also recommend doctor-lawyer discussions for a subtler reason. Facilitating a satisfactory prehearing disposition for persons facing commitment will help protect those commitment hearings which are needed from what has been termed "over-judicialization"—the situation in which judicial proceedings become empty and perfunctory rituals, even for difficult cases, because the court is forced to deal repeatedly with cases whose dispositions seem obvious.[173] Commitment hearings in most of the jurisdictions described suffered from "over-judicialization" and appeared little more than rubber stamps for uncontested doctor recommendations.[174] This dilution of the commitment hearing can be largely avoided by arranging for attorneys for people facing commitment to meet with doctors prior to hearings in an attempt to find a placement of the client satisfactory to both the client and the doctor. Such a procedure is analogous to pre-trial conferences that take place in many areas of the law.

---

[169] *See* Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, *supra* note 58, at 441-58 (1966).

[170] *See* Draft, § 4e.

[171] *Id.*

[172] For claims of harm to the well being of ill persons that may be caused by due process hearings, *see* Kadish, *A Case Study in the Significance of Procedural Due Process—Institutionalization of the Mental Ill*, 9 W. Pol. Q. 93 (1956). George Dix, on the basis of his study of commitments in St. Louis, takes strong issue with many of Kadish's points. *See* Dix, *supra* note 39, at 575-78.

[173] *See* R. Rock, M. Jacobson & R. Janopaul, *supra* note 20, at 122, 124. Interviews with Ronald Rock, attorney, American Bar Foundation, June, 1972, and Simon Rosenzweig, *supra* note 22.

[174] See the descriptions of current systems in Part IV of this article.

The performance of the MHIS in New York's First Judicial Department points out the values of such a procedure in both conserving judicial energies and increasing the likelihood of meaningful judicial review in those cases coming before the court. Since the MHIS began serving patients at Bellevue hospital, the staff attorneys have regularly met with their clients' doctors prior to court hearings both informally and in "intensified prehearing conferences."[175] These meetings between the attorney and her client's doctor appear to be the primary cause of the dramatic decrease in the number of judicial hearings and the significant increase in the proportion of patients gaining release through judicial review.[176]

---

[175] *See* Kumasaka, *The Lawyer's Role in Involuntary Commitment—New York's Experience*, *supra* note 96, at 21.

[176] *Id.*

APPENDIX

DRAFT OF A STATUTE TO ESTABLISH A MENTAL HEALTH ADVOCACY AGENCY

Section 1. Mental Health Advocacy Agency Created

There is hereby established a Mental Health Advocacy Agency, hereinafter referred to as "the Agency," which shall operate under the general supervision of the Supreme Court. The Chief Justice shall appoint the Director of the Agency who shall serve for a period not to exceed seven (7) years. The Director shall devote her entire time to the performance of the duties of her office. She may incur such expenses as may be found necessary to carry out the provisions of the Act. All salaries and expenses of the Agency shall be paid in the same manner as the salaries and expenses of other state employees are paid.

Section 2. Definitions

In this act:

a. The "Agency" is the Mental Health Advocacy Agency
b. The "Director" is the Director of the Mental Health Advocacy Agency
c. An "alternative system of counsel" is any system providing:
    (1) attorneys working part-time, but no less than half-time, on the staff of the Agency, or
    (2) private attorneys approved and assigned by the Agency on a case-by-case basis in a systematic and publicized manner devised by the Director and approved by the Supreme Court, or
    (3) attorneys from a division of a legal aid society or comparable public or private organization created at the request of the Director.

d. The feminine gender includes the masculine gender.

Section 3. Duties of Agency Director

Subject to rules and regulations promulgated by the Supreme Court, the Director shall:

a. Develop a plan for providing legal counsel to persons facing involuntary civil commitment that:
    (1) provides legal counsel in each county or group of counties in the State through attorneys working full-time on the staff of the Agency, except in the circumstances provided in subsection (a)(2) of this section;
    (2) provides legal counsel through an alternative system of counsel, as defined in Section 2c, in any county or group of counties in which she finds that such a system offers substantial ad-

vantages in terms of financial costs while assuring effective assistance of counsel for persons facing commitment;

(3) assures continuous representation of clients, by the same attorney whenever possible, in all proceedings relating to the commitment or retention of clients, until such time as the client is no longer subject to the jurisdiction of the Mental Health Department, or retains her own attorney;

b. After a plan developed in accordance with subsection (a) has been approved by the Supreme Court, implement and administer the plan in all parts of the State;

c. Assure that within each county or group of counties of the plan as approved in subsection (b) the number of attorneys is adequate to provide effective legal assistance to all persons facing commitment without overburdening any attorney;

d. Compensate attorneys in the following manner:

(1) attorneys working full time on the staff of the Agency shall be paid an annual salary equivalent to that paid members of the attorney general's staff of comparable experience;

(2) attorneys working part time on the staff of the Agency shall be paid a salary proportional to that of full-time attorneys of comparable experience;

(3) attorneys from a subdivision of a legal aid society or comparable public or private organization created at the request of the Director shall be paid an annual salary in accordance with the salary scale of the other staff members of that organization;

(4) private attorneys appointed by the service on a case-by-case basis, in accordance with procedures devised by the Director and approved by the Supreme Court, shall receive:

(a) reimbursement at a rate of $25 per hour for necessary time spent, except that, after January 1, 1977, the Director, with the approval of the Supreme Court, may raise the rate up to a maximum of $40 per hour, if she finds such a higher rate necessary to encourage effective representation; and

(b) reimbursement for expenses reasonably incurred in the course of representation.

e. Include on the staff of the service in each county or group of counties full-time social workers to assist attorneys in their investigation of the facts of the case and of alternative placements available to clients, provided that where the number of cases does not justify the hiring of a full-time social worker then the Director shall assure the availability of social workers hired on a part-time basis or by contract with other private or public organizations;

f. Retain such paraprofessional personnel and law students as the Director finds appropriate, to perform, or aid attorneys in performing, tasks permitted by the Code of Professional Responsibility and found by the Director to be susceptible to fully adequate handling by

paraprofessionals or law students.
g. Retain as consultants in all counties or group of counties psychiatrists adequately compensated by the State for time spent assisting attorneys;
h. Provide or contract for such specialized training of attorneys and other staff members as is desirable to assure effective legal representation;
i. Develop regulations, subject to approval by the Supreme Court, regarding the reimbursement of the State by persons represented by the Agency who possess sufficient available assets excluding homestead and personal effects that they can be justly expected to pay all or a portion of the costs of their representation;
j. Develop regulations specifying the manner in which attorneys provided by the Agency or other Agency staff members are to prepare reports on the available assets of clients, which reports shall serve as the basis for the court's determination of financial ability;
k. Present to the Supreme Court annually, or at such lesser intervals as the Court shall request or the Director deems appropriate, reports describing the services provided during the preceding year, evaluating the systems of counsel under her supervision, and recommending in the form of amendments to the plan approved pursuant to Section 3b any changes that ought to be instituted, which changes shall, upon approval by the Supreme Court, become a part of the operating plan of the agency;
l. Perform such other tasks as are found necessary to provide effective legal assistance to persons facing proceedings relating to commitment to or retention at a hospital.

Section 4. Duties of Attorneys

Legal counsel provided through the Agency shall, subject to rules and regulations promulgated by the Supreme Court:

a. Interview clients promptly after the Agency has received notice of the initiated commitment proceedings and inform the client of her rights and the nature of the proceedings she faces;
b. Inform herself as to the facts of the case and investigate alternative placements possibly available to the client;
c. Advise the client as to the alternatives that may be available to her;
d. Serve as an advocate for the release of her client or for such placement as the client shall desire in all matters relating to commitment;
e. Meet in appropriate cases with one or more of the doctors who have examined the client or other hospital staff members in order to determine whether a disposition can be arranged that is satisfactory to the doctor and client;
f. Obtain an independent psychiatric examination of the client, where appropriate;

g. Remain in contact with the client and continue to represent the client in accordance with rules and regulations established by the Director and approved by the Supreme Court;
h. Prepare reports for the court on the assets of clients, in accordance with regulations developed by the Director and approved by the Supreme Court;
i. Perform such other duties that counsel finds necessary to the effective representation of the client.

Section 5. Duties of the Committing Court

The court shall perform the following:

a. Inform the Agency or the retained attorney, as is appropriate, of each person facing involuntary civil commitment proceedings on the same day that the court receives the petition for commitment or notice of the patient's nonvoluntary admission to a hospital;
b. On the basis of the Agency report and in accordance with regulations promulgated by the Supreme Court, make a determination of financial ability in order that those persons who have available liquid assets sufficient to afford counsel shall reimburse the State for the cost of counsel;
c. Allow an attorney for any person facing involuntary civil commitment adequate time to prepare for hearings while meeting her other obligations.

Section 6. Duties of the Department of Mental Health and its Hospitals

The Department of Mental Health and the hospitals shall perform the following, subject to such directions of the Supreme Court as are necessary to assure fair and adequate hearings and representation:

a. Make hospital records that are not explicitly barred by statute from release available to the attorneys representing patients;
b. Permit attorneys to visit patients during normal business hours and at other reasonable times;
c. Provide space, including at least part-time office space, for attorneys to interview patients in privacy and carry out other duties of counsel;
d. Provide for staff doctors and other appropriate staff persons to meet with attorneys prior to hearings;
e. Notify the agency or the retained attorney, as is appropriate, of the admission, transfer, change of status or release of any person facing involuntary civil commitment or involuntarily committed, except in cases in which notice of the action has already been provided by the court pursuant to Section 5a.

Collateral Provisions Important to a Well-Functioning Counsel System:

Section 7. The Prosecuting Attorney[177]

The prosecuting attorney of a county in which a court has a principal office shall participate, either in person or by assistant, in hearings convened by the court under this chapter.

Section 8. Transcripts

All proceedings under this chapter shall be transcribed and the transcription made available to the person alleged to be mentally ill in the same manner as it is made available to defendants in criminal trials in circuit court.

---

[177] This section is borrowed from a draft of the commitment statute developed by the staff of the Michigan Legislative Committee to Revise the Mental Health Statutes.

Mississippi Law Journal

**JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL OF LAW**

VOLUME 45 **JANUARY 1974** **NUMBER 1**

EDITORIAL BOARD

DAVID W. MOCKBEE
Editor-in-Chief

DAVID H. BAKER
Assistant Editor

DAVID L. REYNOLDS
W. WAYNE DRINKWATER, JR.
Article Editors
WILLIAM B. WICKER
STEPHEN D. SZEGO
Research Editors
PATRICK TAYLOR
Index and Review Editor

WILLIAM L. SHAPPLEY, JR.
Business Manager
NICK LEONARD
ROBERT E. WARREN
WILLIAM STEENE PAINTER
Note-Comment Editors
RONALD REID WELCH
Special Projects Editor

WILLIAM M. CHAMPION
Faculty Advisor

ASSOCIATE EDITORS

Robert T. Gordon, Jr.
George R. Lyles

Clayton J. M. Adkinson
Kenneth D. Barfield
Charles Claiborne Barksdale
John W. Beam, Jr.
William Lee Colbert, Jr.
Thomas C. Collier, Jr.
Charles Greg Copeland
P. D. Fyke
Thomas J. Ginger
Eugene Thomas Holmes
Charles Fremont Johnson III
Judith Jones Johnson
John Harold Kettelkamp
William J. Landers
Melvin Hurley McFatter
Martin C. McWilliams, Jr.

William C. Murphree
W. McDonald Nichols
Judith Karen Oakes
Samuel Jesse Owens, Jr.
Mark Phillip Rabinowitz
Stephen W. Rosenblatt
Henry A. Schutz III
William Dean Stark
Thomas W. Tardy
Jim B. Tohill
Wendell Holmes Trapp
Wayne B. Vance
Randall D. Waks
W. David Watkins
William Richard Wright
Arnold Harry Zudick

COMMENTS

THE FAIR CREDIT REPORTING ACT AMENDMENTS: ENFORCEMENT OF THE LEGISLATIVE TRUST?

> At some point the individual's right to privacy must take precedence over the creditor's right to obtain information.
>
> Senator William Proxmire*

On October 13, 1970, following extensive hearings in both the Senate and the House, Congress enacted the Fair Credit Reporting Act [FCRA] in an attempt to require consumer reporting agencies to "adopt reasonable procedures" to assure the accuracy, confidentiality and relevancy of information in consumer reports.[1] The passage of fair credit reporting legislation represented a pioneer effort in protecting the rights of the consumer against encroachment by the reporting industry.[2] As an initial legislative effort, however, the FCRA contains many loopholes and weaknesses. While the Act does provide for the correction of inaccurate information, it does little to safeguard the consumer's right to privacy. Nor does the legislation contain any realistic provision for enforcing compliance with its requirements.[3] The Fair Credit Reporting Act is, in the words of one authority, a "legislatively imposed trust."[4]

Today, almost 3 years since the Act went into effect,[5] it is evident that this legislative trust has not been successful in fulfilling the Act's purpose. Recognizing the weaknesses of the FCRA, Senator William Proxmire in August, 1973, introduced the Fair Credit Reporting Act Amendments, designed to enforce the trust which Congress had reposed in the credit bureaus.[6]

The purpose of this comment is to explore the problems engendered by consumer reporting and to suggest a more realistic legislative formula for enforcing the rights of the consumer. Since the Fair Credit Reporting Act was a product of years of consumer frustration, this study will approach the FCRA and Senator Proxmire's amendments through a historical perspective. In analyzing the FCRA and the Proxmire amendments, the focus will be on whether the legislative language will provide sufficient incentives for consumer reporting agencies to dispel the atmosphere of error which now pervades the reporting process.

---

*TIME, May 3, 1971, at 88.

[1] 15 U.S.C. § 1681(b) (1970).

[2] Prior to the passage of the FCRA, no federal legislation had been passed regulating the activities of credit bureaus and only one state had adopted substantive measures. *See* OKLA. STAT. ANN. tit. 24, §§ 81-85 (1965).

[3] *Cf.* Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer*, 49 TEXAS L. REV. 837, 864-65 (1971).

[4] Feldman, *Fair Credit Reporting Act—Provisions and Problems*, 61 ILL. B.J. 314, 318 (1973).

[5] The FCRA did not go into effect until April 25, 1971. Note following 15 U.S.C. § 1681 (1970).

[6] 119 CONG. REC. S15605 (daily ed. Aug. 3, 1973).

I. INTRODUCTION TO THE PROBLEM OF CONSUMER REPORTS

Consumer reports serve an important economic function in our society by providing merchants with the information necessary to intelligently determine the worthiness of applicants for credit, insurance, or employment. These reports are of two distinct types: (1) credit reports, which are limited to the subject's credit history and other public record data,[7] generally furnished by small, local credit bureaus;[8] and (2) investigative reports, which include personal information on a subject's character and reputation gained from interviews with neighbors, friends, and acquaintances. These comprehensive personal dossiers are usually prepared for prospective employers and insurance companies by large national investigating agencies.[9]

Coincident with the boom in the installment credit industry following World War II,[10] the mercantile agencies which supply consumer reports have experienced tremendous growth in recent years.[11] Expansion in the reporting industry has been further stimulated in the last decade by the introduction of electronic data processing.[12] The proliferation of consumer reports has now reached the point where every adult in this country will soon be reported in the files of some mercantile agency.

With the rapid growth of the reporting industry, however, have come the inevitable problems of an industry which has expanded beyond its capacity to control the quality of its product. The two basic complaints with the consumer reporting system stem from the inclusion of erroneous or misleading information in consumer files and the invasion of the individual's right to privacy.

---

[7] *Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 1st Sess. 91 (1969) [hereinafter cited as *Hearings on S. 823*].

[8] An exception to this rule is Credit Data Corp. which has files on 27 million people. *Id.* at 227.

[9] Retail Credit Co., with 7,000 investigators and 45 million files, controls 60 percent of the retail credit bureau market. Hooper-Holmes Bureau maintains between 9 and 10 million files. *Hearings on H.R. 16340 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 91st Cong., 2d Sess. 628 (1970) [hereinafter cited as *Hearings on H.R. 16340*].

[10] Since World War II, outstanding consumer installment credit has grown from $5.7 to $110 billion as of 1967. *Hearings on S. 823, supra* note 7, at 12.

[11] Even the local credit bureaus have access to the files of 110 million individuals through their national trade association, the Associated Credit Bureaus of America [hereinafter referred to as ACB]. *Hearings on H.R. 16340, supra* note 9, at 554.

[12] Credit Data Corp., the first commercial credit agency to computerize its files, attributed its rapid expansion to increased demand for credit reports and computerization. *Hearings on S. 823, supra* note 7, at 223, 227.

Common sources of error in credit and investigative reports include: (1) confusion in the subject's identity; (2) the use of unreliable sources of information; (3) computer and clerical errors; and (4) incomplete or misleading information.[13] To a large degree, the incidence of these errors may be attributed to the stress placed by the reporting agency on volume rather than accuracy. By imposing a production quota system on its investigators and by discouraging verification of adverse information, the commercial reporting institutions have created an atmosphere which breeds erroneous consumer reports.[14] Several investigative agencies specialized in reporting only derogatory information.[15] There has also been evidence that some reporting companies require their investigators to report certain minimum amounts of adverse information.[16] Given the lack of any direct incentives for investigators to include favorable information in their reports or to verify the adverse information which they uncovered, it is surprising that the incidence of errors in consumer reports is not greater than reported.[17]

Complicating this situation was the inability of the consumer, prior to the enactment of the FCRA, to correct the inaccurate information in his file. Many consumers were unaware that a report on them even existed. The reporting institutions sought to preserve the secrecy of their existence by requiring nondisclosure of reports to the subjects as a condition of their subscription contracts.[18] Even if the consumer somehow discovered the location of his file, he was seldom permitted to examine the report to determine if errors existed.[19] Those credit bureaus which did permit the subject access to his record usually required the consumer to sign a waiver of his rights against the reporting agency before he was allowed to see his file.[20] Once the subject discovered that inaccurate or misleading information had been reported, he was little better off. Verification of the disputed information could not be compelled, and the subject was not even entitled to add his own account of the disputed matter. Shielded from responsibility to the subjects of their reports by the conditional privilege, the credit bureaus were free to do as they chose without fear of liability.[21]

---

[13] 115 CONG. REC. 2411 (1969) (remarks of Senator Proxmire).

[14] One former investigator for Retail Credit Co. testified, "[T]he pressure of the production quota system is so great that inspectors rarely reconfirm the old information taken from the files of previous investigations." *Hearings on S. 823, supra* note 7, at 399.

[15] *Hearings on Commercial Credit Bureaus Before the Spec. Subcomm. on Invasion of Privacy of the House Comm. on Gov't Operations*, 90th Cong., 2d Sess. 114 (1968) [hereinafter cited as *Commercial Credit Hearings*]. Hooper-Holmes Bureau is such an agency.

[16] *Hearings on S. 823, supra* note 7, at 399.

[17] *Hearings on H.R. 16340, supra* note 9, at 129-30.

[18] *Hearings on S. 823, supra* note 7, at 189.

[19] *Id.* at 184-85.

[20] *See, e.g., Hearings on H.R. 16340, supra* note 9, at 141.

Not only was the consumer unable to correct errors in his file prior to the passage of the FCRA, but he also had no control over the content and dissemination of information in his dossier. The problem of credit bureaus reporting highly personal information which was irrelevant to the needs of the subscribing business was most acute in investigative consumer reports. The standard forms used by the major investigating companies commonly included specific requests for items which had, or should have had, no bearing upon the subscriber's decision to extend credit, insurance, or employment.[22] In other cases, the requested information may have had some slight relevance to the subscriber's needs, but that relevance was dwarfed by the highly personal and prejudicial nature of the information.[23] Besides specifically requesting irrelevant information, the investigative agencies provided blank spaces at the end of their reporting forms for "other information" on the consumer's "character, habits and morals."[24] Due to the undefined nature of those terms and the encouragement given to the reporting of adverse information, individual investigators were unleashed from any ties to relevant reporting and invited to include neighborhood gossip on such subjects as a credit applicant's alleged sexual deviations[25] and mental psychosis.[26] The problem of irrelevancy was compounded by the unreliability of the sources from which such personal information was often obtained.

Representatives of the reporting industry contended that their reports merely recorded what their investigators had been told and did not draw conclusions.[27] However, the negative inference created by such highly personal gossip was probably as damaging as any conclusion which could be drawn in the report itself.

---

[21] *See id.* at 247. *See also* text accompanying notes 34-44 *infra.*

[22] American Service Bureaus included the question, "What is his racial descent?" in its life insurance reports. *Hearings on S. 823, supra* note 7, at 278. O'Hanlon Reports Co. included the query—"Racial descent (Italian, Negro, etc.)"—on its questionnaires. *Id.* at 304-05, 307.

[23] Retail Credit Co. includes in its life insurance forms questions on whether the applicant receives income from welfare or charity or lives in a neighborhood having "radical movements." *Hearings on H.R. 16340, supra* note 9, at 484.

[24] *See, e.g., Hearings on S. 823, supra* note 7, at 211, 311.

[25] *See, e.g.,* Wetherby v. Retail Credit Co., 235 Md. 237, 238, 201 A.2d 344, 345 (1964) (credit applicant who gave "loud and boisterous parties" reported as "lesbian").

[26] *See, e.g.,* Wilson v. Retail Credit Co., 325 F. Supp. 460, 462 (S.D. Miss. 1971), *aff'd,* 457 F.2d 1406 (5th Cir. 1972) (housewife reported as "neurotic or psychotic").

[27] A representative of Hooper-Holmes Bureau testified that their investigators would

The individual's right to privacy was further violated by the lack of any internal or external security procedures to assure the confidentiality of reports. The commercial reporting companies refused to install any internal security procedures to deter the raiding of their computer banks on the grounds that such precautions were unnecessary in view of the trustworthiness of their employees.[28] External security was also a problem despite the assurances of the credit bureaus that no one without a legitimate business need for the reports could gain access to their files.[29] Widely publicized experiments conducted by CBS News[30] and a Columbia University professor[31] demonstrated the emptiness of those assurances. The confidentiality of the individual's file was also destroyed by the free access accorded to government investigative agencies for "national security."[32] Despite the public policy in favor of this "national security" exception, actual experience proved that this privilege was open to abuse by such agencies as the IRS and FBI.[33]

It is apparent that some of the problems engendered by credit and investigative reports were the product of rapid growth within the consumer reporting industry. However, many of the continuing abuses of the reporting process may be traced to the unwillingness of the industry to initiate corrective procedures.

II. Consumer Remedies Prior to the FCRA

Prior to the passage of the Fair Credit Reporting Act, the victim of a consumer report had no effective remedy against the reporting agency which had included erroneous information in his file or invaded his

---

not report that a particular individual was a homosexual but rather that certain people said he had "homosexual tendencies." Wall Street Journal, Feb. 5, 1968, at 16.

[28] *Id. See generally* Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 Mich. L. Rev. 1091, 1207-21 (1969).

[29] *Hearings on S. 823, supra* note 7, at 143 (testimony of John L. Spafford, president, ACB).

[30] Using the fictitious title of Transistair Systems, CBS News requested credit reports from 20 credit bureaus in different states. Reports were promptly sent by bureaus in 10 of the states, including Mississippi. Only two of the credit bureaus checked Transistair's credentials as required by ACB Guidelines. *Hearings on H.R. 16340, supra* note 9, at 59-61.

[31] *See Commercial Credit Hearings, supra* note 15, at 7-11 (experiment conducted by Dr. Alan Westin).

[32] *Hearings on S. 823, supra* note 7, at 149.

[33] The president of Hooper-Holmes Bureau stated that the FBI was "constantly in our files" and "can do just about anything they want to." Sesser, *Big Brother Keeps Tabs on Insurance Buyers*, New Republic, Apr. 27, 1968, at 11.

privacy. The two traditional judicial actions were for libel and invasion of privacy. While federal legislation has generally preempted their use,[34] consideration of these remedies and their inadequacies will help to set the climate of consumer frustration which led to the enactment of the FCRA.

The consumer who sued the credit bureau for defamation was rarely able to recover[35] because the vast majority of courts recognized the consumer report as conditionally privileged.[36] This qualified or conditional privilege[37] was lost where the erroneous statement was made with actual malice[38] or released to persons with no legitimate interest.[39] Malice could be proven only by showing that the erroneous statement was made without probable cause for believing its truth[40] or in wanton and reckless disregard of the rights of others.[41] Similar defamations were also admissible to show malice,[42] but this aid to the proof of malice was foreclosed, at least in Mississippi, where consumer reports were conditionally privileged even in discovery proceedings.[43] The Mississippi consumer was therefore faced with the dilemma of having to overcome the conditional privilege in order to gain access to his report.[44] Even if the consumer managed to defeat the conditional privilege, he was faced with the additional Herculean task of proving actual damages in a libel action.[45]

More recently, the consumer has turned to the action for invasion of privacy as a device for imposing liability on the reporting agency for disseminating highly personal, generally irrelevant, information about his character but has met with a similar lack of success.[46] The suit for invasion of privacy was favored by the consumer because the courts were more inclined to award liquidated damages in such cases than in libel suits.[47] However, the action was limited by the requirement that the disclosure be to the public or to a large group.[48] In addition, the consumer was again confronted by the conditional privilege.[49] Because of the public policy in favor of frank disclosure of information in credit and investigative reports, the consumer's "right to be let alone"[50] was excluded from the constitutionally protected "penumbra of privacy."[51]

---

[34] 15 U.S.C. § 1681h(e) (1970).

[35] *See, e.g.*, Watwood v. Stone's Mercantile Agency, Inc., 194 F.2d 160 (D.C. Cir. 1952); Riley v. Dun & Bradstreet, Inc., 172 F.2d 303 (6th Cir. 1949); Hooper-Holmes Bureau, Inc. v. Bunn, 161 F.2d 102 (5th Cir. 1947).

[36] Retail Credit Co. v. Garraway, 240 Miss. 230, 126 So. 2d 271 (1961). See Note, *Protecting the Subjects of Credit Reports*, 80 Yale L.J. 1035, 1050 nn. 86 & 87 (1971), for an extensive treatment of the states which have recognized the conditional privilege.

[37] Under the doctrine of conditional privilege, reports prepared by mercantile agencies in good faith and furnished only to those with a legitimate interest in them are qualifiedly privileged and cannot be introduced as evidence in the absence of violation of that interest. Trussell v. Scarlett, 18 F. 214 (C.C. Md. 1882).

[38] *See generally* W. Prosser, Handbook of the Law of Torts 794-95 (4th ed. 1971).

[39] *See, e.g.*, H.E. Crawford Co. v. Dun & Bradstreet, Inc., 241 F.2d 387 (4th Cir. 1957).

[40] *See, e.g.*, Stationers Corp. v. Dun & Bradstreet, Inc., 62 Cal. 412, 398 P.2d 785, 42 Cal. Rptr. 449 (1965).

[41] *See, e.g.*, Kroger Grocery & Baking Co. v. Harpole, 175 Miss. 227, 236, 166 So. 335, 339 (1936).

[42] Tipps Tool Co. v. Holifield, 218 Miss. 670, 685, 67 So. 2d 609, 616 (1953).

[43] Retail Credit Co. v. Garraway, 240 Miss. 230, 240, 126 So. 2d 271, 275 (1961).

[44] *Id.* Mississippi is the only jurisdiction which has extended the conditional privilege to discovery proceedings. However, the Mississippi discovery rule may be circumvented by bringing the action in federal court. *See, e.g.*, Wilson v. Retail Credit Co., 325 F. Supp. 460 (S.D. Miss. 1971).

[45] *See, e.g.*, Reliance Mfg. Co. v. Graham, 181 Miss. 549, 179 So. 341 (1938).

The conditional privilege was first extended to commercial credit reports in this country during the 19th century when the reporting industry was in its infancy and the imposition of judicial liability threatened its very existence.[52] The rationale underlying the privilege was that credit reports were "of the greatest service to the business men of the country."[53]

A number of commentators in recent years have advocated the judicial abrogation of the conditional privilege. Their arguments are premised upon a rejection of the "economic disaster smokescreen"[54] and a desire to make credit bureaus and other mercantile investigators more responsive to the rights of the individuals on whom they report.[55] The

---

[46] *See* Martin v. Dorton, 210 Miss. 668, 672, 50 So. 2d 391, 393 (1951), recognizing the action for invasion of privacy.

[47] *See, e.g.*, Fairfield v. American Photocopy Equip. Co., 138 Cal. App. 2d 82, 291 P.2d 194, 198-99 (1955).

[48] *See, e.g.*, Peacock v. Retail Credit Co., 302 F. Supp. 418 (N.D. Ga. 1969).

[49] *See, e.g.*, Wilson v. Retail Credit Co., 325 F. Supp. 460 (S.D. Miss. 1971); Shorter v. Retail Credit Co., 251 F. Supp. 329 (D.S.C. 1966). *See also* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 216 (1890).

[50] *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[51] *See* Griswold v. Connecticutt, 381 U.S. 479 (1965).

[52] For an analysis of the early arguments in favor of and against the conditional privilege, see Smith, *Conditional Privilege for Mercantile Agencies—MacIntosh v. Dunn*, 14 COLUM. L. REV. 187 (1914). *See generally* Note, *The Mercantile Agency and Conditional Privilege in Defamation*, 11 S.C.L.Q. 256 (1959).

[53] Trussell v. Scarlett, 18 F. 214, 220 (C.C. Md. 1882). For additional cases recognizing the conditional privilege, see Erber & Stickler v. R.G. Dunn & Co., 12 F. 526 (C.C.E.D. Ark. 1882); Pollasky v. Minchener, 81 Mich. 280, 46 N.W. 5 (1890); King v. Patterson, 49 N.J.L. 417, 9 A. 705 (Ct. Err. & App. 1887); Ormsby v. Douglass, 37 N.Y. 477 (1868).

[54] Professor Arthur Miller coined this phrase to describe the argument of economic unfeasibility put forward by the consumer reporting industry to avert regulation. *Hearings on S. 823, supra* note 7, at 364. *See also* Shore v. Retailers Commercial Agency, 342 Mass. 515, 174 N.E.2d 376, 379 (1961), holding, "Without such protection few would undertake to furnish the information, and the cost would be high, if not prohibitive."

[55] *See, e.g.*, Ullman, *Liability of Credit Bureaus after the Fair Credit Reporting Act: The Need for Further Reforms*, 17 VILL. L. REV. 44, 72 (1971); Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L.J. 509, 518 (1969).

Fifth Circuit Court of Appeals has recently rejected the economic disaster smokescreen as a basis for extending the conditional privilege.[56] Grounding its decision upon public policy rather than *stare decisis*,[57] the court in *Hood v. Dun & Bradstreet, Inc.* recognized that ". . . in recent years there has been an apparent shift in emphasis from the protection of the credit reporting agency to the protection of the individual or business enterprise being investigated."[58] In its rejection of the rationale underlying the conditional privilege the court thereby placed itself in the vanguard of the movement to vindicate the rights of the consumer. However, several factors may lessen the impact of the *Hood* decision. First, it is unlikely that the court's reasoning will be adopted in other jurisdictions in the near future.[59] Further, even if the policy of *Hood* is accepted by other courts, it is doubtful that an end to the conditional privilege will substantially ameliorate the plight of the consumer. Maintenance of defamation suits and actions for invasion of privacy are not economically feasible for the average applicant for credit, insurance, or employment.[60] In addition, proof of any substantial actual damages would be virtually impossible,[61] and punitive damages would not be available in the absence of malice or reckless and wanton misconduct.[62]

However, the need to make the credit industry more responsive to the rights of the individual subject has generally been recognized by all observers including the credit reporting industry itself.[63] The basic difference between the views of the consumer advocates and spokesmen for the credit bureaus lies in how those rights should be vindicated. The credit bureaus and their trade associations have advocated a system of internal regulation.[64] It will become evident in the succeeding analysis of the federal legislation that the reporting industry has been quite successful in achieving its objective.

---

[56] Hood v. Dun & Bradstreet, Inc., Civil No. 72-1233 (5th Cir., Sept. 14, 1973), citing the flourishing business of credit bureaus in states which gave no recognition to the conditional privilege as a basis for its conclusion.

[57] Prior to the district court's recognition of the conditional privilege, Georgia had rejected the conditional privilege. Hood v. Dun & Bradstreet, Inc., 335 F. Supp. 170, 179 (N.D. Ga. 1971). *See* Western Union Tel. Co. v. Pritchett, 108 Ga. 411, 34 S.E. 216 (1899); Johnson v. Bradstreet Co., 77 Ga. 172 (1886) (rejecting the conditional privilege).

[58] *See* note 56 *supra*.

[59] While the court of appeals in *Hood* did not rely on earlier Georgia decisions rejecting the conditional privilege as a basis for their holding, it is only natural that courts in other jurisdictions will continue to look to cases recognizing the conditional privilege for authority. Only one state besides Georgia has expressly rejected the conditional privilege. *See* Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 139 P. 1007 (1914).

[60] D. CAPLOVITZ, THE POOR PAY MORE 171 (1967).

[61] Interview with Sheldon Feldman, Assistant Director for Special Statutes, FTC, in Washington, D.C., June 7, 1973. The only exception to this rule would arise in the case of the applicant for life insurance who was denied a policy solely on the basis of a consumer report and died immediately afterwards.

[62] W. PROSSER, *supra* note 38, at 792-96.

[63] *See Hearings on S. 823, supra* note 7, at 146-48 (testimony of John L. Spafford); *Commercial Credit Hearings, supra* note 15, at 96 (testimony of Harry C. Jordan, president, Credit Data Corp.).

III. THE FAIR CREDIT REPORTING ACT

A. *Evolution of the Act*

Because of the proliferation of personal dossiers following the introduction of the computer into the reporting industry and the obvious inadequacy of existing consumer remedies, it was inevitable that the plight of the victim of erroneous credit and investigative reports would become a matter of public concern. Early congressional investigations[65] uncovered stories of average middle-class Americans whose lives had been wrecked by grossly inaccurate investigative reports.[66] The public consciousness was further awakened by the appearance of articles in household publications[67] and television serials[68] about the mysterious credit bureaus.

Recognizing the growing public concern over the independence of the reporting industry, the credit bureaus attempted to forestall congressional legislation[69] which would interfere with their existing reporting practices by the promulgation of trade association guidelines.[70] Because no provision existed for their enforcement and because they were not binding on the nation's largest mercantile investigative agencies,[71] the Associated Credit Bureau Guidelines did not prevent the enactment of federal legislation.[72] However, they did have the desired effect of persuading Congress that the credit bureaus were making a good faith effort at curbing the more abusive practices of the reporting industry.[73] While Congress was not ready to accept self-regulation by the credit bureaus, the final draft of the FCRA did indicate a willingness to limit initial federal legislation to a "legislatively imposed trust."

---

[64] *Hearings on S. 823, supra* note 7, at 148.

[65] *See Hearings on Retail Credit Co. of Atlanta Before the Spec. Subcomm. on Invasion of Privacy of the House Comm. on Gov't Operations*, 90th Cong., 2d Sess. (1968); *Hearings on S. Res. 233 Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.*, 90th Cong., 2d Sess. (1968).

[66] *See* 115 CONG. REC. 2411-12 (1969) (remarks of Senator Proxmire).

[67] *See, e.g.*, GOOD HOUSEKEEPING, Sept., 1969, at 184; Sesser, *supra* note 33.

[68] *See* 115 CONG. REC. 1424 (1969) (for the script of the "Judd for the Defense" serial).

[69] This conclusion is based upon the coincidence between the date when the guidelines were published (January 10, 1969) and the date on which S. 823 was introduced (January 21, 1969). The fact that the trade association had existed since 1906 without the benefit of guidelines also supports this conclusion. *See Commercial Credit Hearings, supra* note 15, at 5.

[70] 115 CONG. REC. 555-56 (1969) (reporting the Guidelines).

[71] *Hearings on S. 823, supra* note 7, at 115, 141; *Hearings on H.R. 16340, supra* note 9, at 148.

[72] For an extensive treatment of the evolution of the FCRA, see McNamara, *The Fair Credit Reporting Act: A Legislative Overview*, 22 J. PUB. LAW 67 (1973).

B. Analysis of the Act

1. Accuracy and the Correction Process

The passage of the FCRA did virtually nothing to destroy the atmosphere of error which pervaded the credit reporting process. Any provision in the Act which attempted to discourage the initial reporting of erroneous or misleading information by investigators was doomed to failure by the absence of any realistic sanctions against violation of the Act. The provision which was finally adopted—that consumer reporting agencies follow "reasonable procedures to assure maximum possible accuracy"[74] is additionally handicapped by the vagueness of its language. Both the courts[75] and the Federal Trade Commission[76] have attempted to correct the nebulous nature of this language by interpreting the meaning of "reasonable procedures." However, these interpretations are of dubious value as enforceable supplements to the Act.[77] Consequently, in the absence of legislative reform or additional FTC regulation in the form of actions for unfair trade practices,[78] it is likely that the credit reporting industry will continue to produce reports containing errors and misleading information which would have been avoided by the maintenance of adequate verification procedures and stressing accuracy rather than volume in the reporting process.

---

[73] *Id.* at 76. *See Commercial Credit Hearings, supra* note 15, at 141.

[74] 15 U.S.C. § 1681e(b) (1970).

[75] Miller v. Credit Bureau, Inc. of Washington, D.C., 4 CCH CONSUMER CREDIT GUIDE ¶ 99,173 (D.C. Super. Ct., June 22, 1972), held that the "reasonable procedures" requirement implies the duty to exercise reasonable care to verify that the individual about whom the derogatory information is received is in fact the consumer who is being investigated.

[76] Reporting agencies may not impose adverse information quotas on investigators. Verification of adverse information by more than one source is required whenever possible. FTC Informal Staff Opinions, COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT 8-9 (2d ed. 1973).

[77] Plaintiff Miller alleged no damages in his complaint nor did he request other monetary relief. Whether the court would have been so generous in its interpretation of the Act's language had Miller prayed for substantial monetary recovery must remain a matter for conjecture. *See* Miller v. Credit Bureau, Inc. of Washington, D.C., 4 CCH CONSUMER CREDIT GUIDE ¶ 99,173 (D.C. Super. Ct., June 22, 1972). In addition, it is doubtful that federal courts will adopt the attenuated reading of "reasonable procedures" taken by a superior court of the District of Columbia.

The judiciary's interpretative power is predicated upon the jurisdictional grant of 15 U.S.C. § 1681p (1970). *Cf.* Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 457 (1957), interpreting substantive federal law by "looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Compare* 29 U.S.C. § 185(a) (1970), *with* 15 U.S.C. § 1681p (1970).

[78] As of October, 1973, no actions had been brought by the FTC for violation of this provision. FTC Table, 1 CCH CONSUMER CREDIT GUIDE 881-89 (1973).

While the Fair Credit Reporting Act does little to eliminate the sources of error in consumer reports, it does provide several guarantees for the consumer in correcting, or at least mitigating the damage of, erroneous and misleading information in his file. The Act requires the subscribing merchant to notify the consumer when an investigative report is ordered[79] and when adverse action is taken, in whole or in part, on the basis of *any* consumer report.[80] The purpose of the notification provisions was to enable the subject of a consumer report to request disclosure from the reporting agency of the "nature and scope" of the information in his file.[81] However, this objective has not been achieved for a number of reasons. First, since the report is often prepared by a nationwide investigating company in a distant state, geographic distance serves as a deterrent against the consumer's personal appearance at the agency for his free personal interview. While the consumer is also entitled to disclosure by telephone following written request, this safeguard is also ineffective since the Act fails to require that the consumer be notified of this right.[82] Even if the consumer does somehow learn of his right to telephone disclosure, the cost of a long distance telephone call would discourage the consumer who is uncertain that errors exist in his file or that he would benefit from the expensive telephone disclosure.[83] Another inadequacy in the FCRA's notification procedure stems from the inability of many consumers to comprehend the nature of an investigative report or to understand their legal rights even when they are supposedly advised of them in the notification process.[84] Further undercutting the effectiveness of the notification and disclosure provisions of the Act are the evasive techniques practiced by merchants.[85]

---

[79] 15 U.S.C. § 1681d(a)(1) (1970). Written notice must be sent within 3 days of the request and must advise the consumer of the type of information to be gathered and of his right to request additional disclosures.

[80] *Id.* § 1681m(a). The user is only required to give the name and address of the agency making the report. *Id.* Advance notification of ordinary consumer reports is not required. FTC Informal Staff Opinion, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,483 (1971).

[81] *Hearings on H.R. 16340, supra* note 9, at 13.

[82] *See* 15 U.S.C. § 1681m(a) (1970), requiring only that the user supply the "name and address of the consumer reporting agency making the report."

[83] *Hearings on the Fair Credit Reporting Act Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 93d Cong., 1st Sess. (1973) (statement of Sheldon Feldman) [hereinafter cited as *FCRA Hearings*].

[84] *Id.* Notification following adverse action on a non-credit report does not advise the consumer of his right to request disclosure. *See* note 80 *supra*.

[85] One practice was to include express clauses waiving disclosure in employment appli-

Indeed, the lack of sanctions in the FCRA and the consumer's inability to otherwise ascertain the existence of his file encourages disregard of the notification requirement altogether.[86]

Like the notification provisions, the disclosure requirements of the FCRA are also subject to widespread abuse. Upon the request[87] of the consumer following adverse action, the user of the report is required to disclose the "nature of the information" contained in the report.[88] Despite the intent of the Congressional framers of the FCRA to "permit the consumer to examine all the information in his file except for sources of investigative information,"[89] it is evident that neither the FTC nor the consumer reporting agencies have followed this broad interpretation of the scope of the "nature of the information."[90]

Specifically excepted from the disclosure requirements are the confidential sources of investigative reports.[91] Under the original House draft of the FCRA, the consumer would have been able to obtain the identity of confidential sources by merely disputing the accuracy of the information.[92] The retail investigative companies argued that such disclosure would dry up their sources and cause the consumer credit process to "return to the horse and buggy days."[93] Due to the opposition of the investigative companies, the provision for disclosure of confidential sources to the consumer without the burden of initiating judicial proceedings was accordingly deleted from the Act.[94] Since most consumers are deterred by prohibitive costs from bringing a judicial action against the reporting agency,[95] the deletion of the provision for disclosing confidential sources has worked a hardship on the consumer in two respects.

---

cation forms. *See* 4 CCH CONSUMER CREDIT GUIDE ¶ 99,449 (1971).

[86] Countryman, *supra* note 3, at 864-65.

[87] Request must be made within a "reasonable period of time" after notification of the report. 15 U.S.C. §§ 1681d(b), m(b) (1970).

[88] For investigative reports, more complete disclosure of the scope of the information reported is required. *Id.* § 1681d(b).

[89] The Senate rejected an amendment proposed by the House conferees which contained this language because, it was thought, the existing language already accomplished this result. H.R. REP. NO. 1587, 91st Cong., 2d Sess. 29 (1970).

[90] FTC Informal Staff Opinion, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,530 (1971).

[91] 15 U.S.C. § 1681g(a)(2) (1970). However, the consumer could obtain the identity of these sources through discovery proceedings by bringing an action against the consumer reporting agency. *Id.*

[92] H.R. 16340, 91st Cong., 2d Sess. § 32 (1970). If the reporting agency refused to expunge the disputed information, then the consumer could request and obtain disclosure of the sources. *Id.*

[93] *Hearings on H.R. 16340, supra* note 9, at 189.

[94] H.R. REP. NO. 1587, 91st Cong., 2d Sess. 29 (1970).

[95] *See* D. CAPLOVITZ, *supra* note 60, ch. 12; Countryman, *supra* note 3, at 865, reasoning: "[M]any subjects, even if they do receive notice, may conclude that life is too short, or their resources too limited to make an effort toward correction."

First, the consumer is disadvantaged in his attempt to disprove the allegation by showing the bias of gossip sources in investigative reports. Second, continued assurances of anonymity to sources promotes the same type of malicious gossip and character assassination which has been prevalent in investigative reports prior to the FCRA.

Once the consumer has been notified and disclosure made, he may dispute the accuracy of the information in the report and, if reinvestigation does not resolve the dispute, add a brief summary of his position to the report.[96] If reinvestigation resolves the dispute between the consumer and the reporting agency, then the consumer can require that past users be notified of the appropriate deletion of information from the report.[97] Otherwise, the consumer's only remedy is to have his version of the dispute included in subsequently released reports.[98] While the Act's provisions appear at first glance to go very far in guaranteeing the consumer's right to correct information, their value is undercut by a number of factors. First, some reporting agencies tend to rely on their original sources in reinvestigations.[99] Second, there is no sanction against indefinite delay in the correction process.[100] Third, the efficacy of allowing the consumer to include his own version of disputed information, vis-a-vis the contradictory account furnished by the reporting agency, is questionable. It is natural that users would tend to subscribe to the disinterested accounts furnished by credit bureaus rather than the personal version added by the consumer.

2. Consumer Privacy

Critics of the Fair Credit Reporting Act assert that the measure does nothing to protect the individual's right to privacy.[101] While the announced purpose of the Act was to insure the relevancy and confidentiality of information,[102] the divergence of the actual provisions of the Act from the language in the preamble illustrates the process of legislative emasculation which the measure underwent on the floor of Congress.

---

[96] 15 U.S.C. § 1681i (1970). The statement is generally limited to 100 words.

[97] *Id.* § 1681i(d). This notification requirement was limited to users for employment purposes within the past 2 years and other users within the last 6 months. *Id.*

[98] The Act provides the consumer with no right to a "second look" at his file to insure that the erroneous information was corrected or deleted, or his account added, as claimed by the reporting agency. W. WILLIER, THE FAIR CREDIT REPORTING ACT: WHAT IS AN ATTORNEY TO DO? 12 (National Consumer Law Center, 1971).

[99] This conclusion is based upon pre-FCRA credit bureau practices in which reinvestigation was limited to asking the source on the telephone if he still subscribed to his statements.

[100] The original FCRA provided a 7-day limit for reverification of information. However, the credit bureaus opposed definite limits on the reverification period as "crippling," and the provision was accordingly deleted in the final draft of the Act. *See* 15 U.S.C. § 1681i(a) (1970) (providing for reverification within a "reasonable period of time"); *Hearings on H.R. 16340, supra* note 9, at 117.

[101] *See* Nader, *The Dossier Invades the Home*, SATURDAY REV., Apr. 17, 1971, at 21 (criticizing the Act's confidentiality restrictions as "no better than those presently avail-

The initial House draft of the FCRA provided for the exclusion of information which was "not reasonably relevant to the purpose" for which it was sought or which unduly infringed upon the individual's right to privacy.[103] As might have been expected, the consumer reporting industry vehemently opposed any regulation over the relevance of information as "but a step away from dictating the credit granter's decision on every credit extension."[104] Under the pressure of "extremely heavy lobbying" by the retail credit bureaus and insurance companies,[105] the relevancy requirement was deleted from the final draft of the Act.[106]

The confidentiality provisions of the FCRA mirrored the ACB Guidelines by limiting dissemination to those with a "legitimate business need."[107] The reporting industry successfully opposed any definition of what constituted a "legitimate business need,"[108] and the result was that the credit bureaus were left virtually free of any regulation on this matter. Since certification of need is not specifically required under the Act, the possibility of continued abuse of the confidentiality standards of the ACB is not foreclosed.[109]

3. Enforcement

As a legislative attempt to make the reporting industry more responsive to the rights of the individual, the Fair Credit Reporting Act has been hampered by the absence of any effective sanctions against violations of the Act. Neither public enforcement by the Federal Trade

---

able"); CONSUMER REPORTS, Apr., 1971, at 20 (calling the Act "a mere popgun against invasion of privacy").

[102] 15 U.S.C. § 1681(b) (1970).

[103] H.R. 16340, 91st Cong., 2d Sess. § 54 (1970). *Cf.* NATIONAL CONSUMER LAW CENTER, NATIONAL CONSUMER ACT § 8.211 (1970), requiring that "objective criteria" be set up for the determination of relevancy.

[104] *Hearings on H.R. 16340, supra* note 9, at 147, 470.

[105] NATION, Aug. 30, 1971, at 132 (statement by Kenneth A. McLean, staff member of the Senate Committee on Banking, Housing and Urban Affairs).

[106] It is not evident whether the House Conference Committee even contested the deletion. *See* H.R. REP. NO. 15073, 91st Cong., 2d Sess. 28-30 (1970).

[107] *Compare* 15 U.S.C. § 1681b(3)(E) (1970), *with* Policy C of the ACB Guidelines, 115 CONG. REC. 555 (1969).

[108] *See Hearings on H.R. 16340, supra* note 9, at 146.

[109] *See* notes 30-31 *supra*. The only difference is that consumer advocates like Mike Wallace who expose the problem will now be criminally liable under the Act. *See* 15 U.S.C. § 1681q (1970).

Commission nor private litigation by injured consumers is feasible under the final draft of the FCRA.

Enforcement of the Act by the FTC has been virtually impossible because Congress failed to vest the Commission with the power to make interpretative regulations. Both the Senate[110] and House[111] drafts of the FCRA would have conferred substantive rulemaking authority for the administrative enforcement of the Act. However, the credit bureaus "firmly opposed" the grant of substantive rulemaking power[112] and secured its deletion. Instead, the Commission's interpretative power was limited to the issuance of "procedural rules in enforcing compliance with the requirements" laid out in the text of the Act.[113] The result was that many of the provisions of the FCRA, which had been drafted in vague terminology with a view toward the promulgation of substantive interpretative regulations by the administrative agency responsible for enforcement of the Act, were left in an unfinished state which made their enforcement impractical.[114]

Further, the wisdom of delegating enforcement of the Act to the Federal Trade Commission is subject to doubt.[115] A study published just prior to the enactment of the FCRA had already exposed the FTC's increasing proclivity to rely entirely on "voluntary enforcement."[116] The Commission's lack of active enforcement was in part due to resources inadequate to cope with the myriad of consumer problems.[117] Even the director of the Federal Trade Commission warned that delegation of enforcement responsibility to the FTC would "increase the demands upon the Commission's staff to the breaking point."[118] It is therefore no wonder that, with neither adequate resources nor the power to issue substantive regulations,[119] the fruits of FTC enforcement have been limited to two consent agreements from consumer reporting agencies[120] and litigation of the Commission's power to subpoena consumer reports.[121]

---

[110] S. 823, 91st Cong., 1st Sess. § 162(b) (1969).

[111] H.R. 16340, 91st Cong., 2d Sess. § 21 (1970).

[112] *Hearings on H.R. 16340, supra* note 9, at 144.

[113] 15 U.S.C. § 1681s(a) (1970). The FTC has interpreted the FCRA to "preclude it from writing rules and regulations." 119 Cong. Rec. S15605 (daily ed. Aug. 3, 1973). *But see* Willier, *supra* note 98, at 12.

[114] *See, e.g.*, 15 U.S.C. §§ 1681(b), (e) (1970). *Cf.* Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971) (FTC staff opinions interpreting the Truth-in-Lending Act held not binding on court). *See also* B. Clark & J. Fonseca, Handling Consumer Credit Cases 191 (1972).

[115] *See* 15 U.S.C. § 1681s, giving the FTC power to bring actions for unfair trade practices under the Act.

[116] E. Cox, R. Fellmeth & J. Schulz, The Nader Report on the Federal Trade Commission 57-58 (1969).

[117] Report of the ABA Comm'n to Study the Federal Trade Commission 28-32, 81-82 (1969).

[118] *Hearings on S. 823, supra* note 7, at 31 (testimony of Paul Rand Dixon, Chairman, FTC).

[119] Chairman Dixon specifically requested that the FTC be given the authority to issue

Private sanctions are also provided in the Act for negligent[122] and willful[123] noncompliance on the part of either the user or consumer reporting agency. Due to the vague language of the FCRA and the FTC's lack of authority to promulgate regulations to implement the Act's language, however, recovery is as unlikely as it was before the enactment of the FCRA when the conditional privilege barred recovery. The difficulty of proving either actual damages or wilful noncompliance further bars establishing civil liability against the reporting agency or user.[124]

IV. Proposed Amendments to the Fair Credit Reporting Act

Recognizing the weaknesses in the FCRA as it now exists, Senator Proxmire has recently proposed substantial amendments to the Act, aimed at securing compliance by the reporting industry and safeguarding, at long last, the rights of the consumer.[125]

A. *Authorization of Investigative Reports*

Currently the FCRA requires only that the prospective user notify the consumer prior to preparation that an investigative report "may be made." It is then incumbent upon the consumer to request disclosure of the "nature and scope" of any investigation.[126] The Proxmire amendments would shift the burden of disclosure from the consumer to the user of the report. First, the consumer would receive disclosure of the "methods and scope" of the proposed investigation without request.[127]

---

substantive regulations. *Id.* at 30, 33.

[120] *See* Speech of Paul Rand Dixon before the Associated Credit Bureaus, Washington, D.C., May 9, 1973.

[121] *See* note 154 *infra*. The FTC has also accepted assurances of voluntary compliance from: Berkshire Life Ins. Co., No. 2231; Home Life Ins. Co., No. 2229; New York Life Ins. Co., No. 2230; Southern Farm Bureau Life Ins. Co., No. 2232; and Teachers Ins. and Annuity Ass'n. of America, No. 2233 (Aug. 2, 1972) FTC Table, 1 CCH CONSUMER CREDIT GUIDE 881-89.

[122] 15 U.S.C. § 1681o (1970). Recovery was limited to actual damages and costs of the action.

[123] *Id.* § 1681n (1970).

[124] Not one penny has been awarded in civil damages for violation of the Act since it went into effect on April 26, 1971. *FCRA Hearings, supra* note 83.

[125] 119 CONG. REC. S15605 (daily ed. Aug. 3, 1973). With several exceptions, both S. 2360 and its companion measure in the House were the product of recommendations by the Federal Trade Commission, drafted by Sheldon Feldman, Assistant Director for Special Statutes, and others.

[126] 15 U.S.C. § 1681d(b) (1970).

[127] S. 2360, 93d Cong., 1st Sess. § 3 (1973).

Due to consumer ignorance in the area of investigative reporting and deliberate attempts by companies to camouflage the reports as "routine investigations," many consumers never comprehend the nature of the notification.[128] Safeguards against these abuses have been provided under the proposed amendments by the requirement that consumers also receive: (1) "all questions to be asked . . . and the likely sources to be contacted . . ." and (2) a blank copy of standard questionnaires used in the investigation.[129] Written authorization by the consumer would then be required before the investigation could be conducted.[130]

The authorization requirement presupposes a balancing between the interests of the consumer and user by reducing the invasion of privacy inherent in investigative reports and at the same time not imposing an unfair hardship upon users of the reports. If the user is unwilling or unable to secure the consumer's authorization of an investigative report, a non-investigative report may still be ordered. On the other hand, once the consumer gives a "knowing" consent to the preparation and dissemination of an investigative report on him, he cannot later complain that his privacy has been invaded. In the future regulation of the authorization requirement, care should be taken to insure that the prospective user of the investigative report does not extort the consumer's consent by the threat of adverse action.[131] Otherwise, the consumer would be confronted with a Hobson's choice between jeopardizing the chances of favorable action on his application and having the privacy of his personal life invaded.

B. Disclosure by Users Pursuant to Adverse Action

The proposed amendments to the FCRA would also require users of consumer reports to furnish the reasons and items of information which were the basis of adverse action as well as a copy of the report.[132] Pinpointing the cause of adverse action would aid the consumer in segregating the adverse information in his file to determine its accuracy.

---

[128] *See, e.g.*, 4 CCH Consumer Credit Guide ¶ 99,534 (1971).

[129] *See* note 127 *supra*. This represents a clarification of the original FTC proposal requiring only "clear and conspicuous written disclosure of the nature and scope." FTC Proposed Amendment to FCRA § 606(1), *FCRA Hearings*, *supra* note 83, at A-2.

[130] Uniform disclosure forms could be developed by the FTC staff. Variations in these forms to allow for the peculiarities of certain types of applications could be approved in advance by the FTC.

[131] The authorization requirement is inherently coercive since many consumers may infer from the mere request of authorization that denial of the request will bring denial of their application. The proposed FTC disclosure form should therefore include a guarantee advising the consumer that denial of authorization cannot be a basis for adverse action on his application.

[132] S. 2360, 93d Cong., 1st Sess. § 7 (1973).

Providing the subject with a copy of the report when adverse action is taken by the user should also greatly facilitate the correction of erroneous adverse information. Under the current Act, the applicant for insurance or employment is not advised of his right to request disclosure of a non-investigative report.[133] The provision for automatic full disclosure to the consumer would eliminate the problems of selective disclosure and consumer ignorance which presently plague the FCRA. However, the automatic disclosure requirement is open to violation by users who choose to ignore it and, if discovered, claim that adverse action was not based on the report.[134] Since the consumer generally has no other means of discovering that a non-investigative report on him has been used, the user is encouraged to forego notification altogether. Blanket notification to all consumers by the reporting agency has been suggested as a possible solution to this problem,[135] but the cost of implementing such a program would be prohibitive.[136]

A more feasible alternative would be to require disclosure to the consumer by the user whenever adverse action is taken, regardless of whether it was based on the consumer report. Since adverse action is usually based at least partially upon the consumer report which was ordered, the additional burden on the user would not be an undue hardship.[137] Not only would this aid in educating the consumer on the nature of consumer reports, but it would also reduce the incentive to ignore the disclosure requirement altogether in reliance upon the "in whole or in part" loophole.

C. *Opening the Files: Disclosure by Consumer Reporting Agencies*

Besides regulating the subscribers to consumer reporting services, Senate Bill 2360 would also require the reporting agency to open its files to the consumer. Full disclosure to the consumer would not only aid in the discovery of erroneous information in his file but should also contribute to a diminution in the use of unreliable sources in investigative reporting. Under the present Act, the reporting agency is required to disclose only the "nature and substance" of the information in the consumer's file.[138] While these words were intended to include all information in the consumer's file except for confidential sources, such has not been the case. In actual practice, it has been found that, as the proportion of adverse or "sensitive" information in a consumer's file increases, the extent of full disclosure correspondingly decreases.[139] The FCRA Amendments should eliminate the problem of selective disclosure by the reporting agencies.

---

[133] *See* 15 U.S.C. § 1681m(b) (1970).

[134] Disclosure is required only when "adverse action is taken either wholly or partly because of information contained in a consumer report." S. 2360, 93d Cong., 1st Sess. § 7 (1973).

[135] A. MILLER, ASSAULT ON PRIVACY 326 (1969); Note, *Arrest and Credit Records: Can the Right of Privacy Survive?*, 24 U. FLA. L. REV. 681, 689 (1972).

[136] For the Credit Bureau of Washington, D.C., alone, the cost could exceed $200,000 for existing files. *FCRA Hearings*, *supra* note 83.

[137] The cost of including a summary of the report in the notification of adverse action would be minimal in comparison with the cost of ordering the report.

Disclosure of confidential sources will accord two benefits to the subjects of investigative reports. First, the consumer will be able to track down malicious gossip and hearsay at their source and prove their inaccuracy beyond dispute. Secondly, disclosure will help to dry up the wellsprings of character assassination which exist in investigative reports.[140] Without assurance of continued anonymity, sources will be encouraged to more fully consider the consequences of maligning the character of the subject of the investigation.

Not only would the proposed amendments to the FCRA entitle the consumer to full disclosure, but Senate Bill No. 2360 would also allow the consumer to obtain that disclosure by telephone, mail, or visual inspection.[141] Allowing the consumer to personally inspect his file and make photostatic copies of its contents will insure that full disclosure is made. Geographical distance would also be removed as an impediment in the correction process by the provision in Senate Bill No. 2360 for disclosure by mail and telephone.[142] If the request for disclosure was made by the consumer within 30 days of his receiving notification of adverse action taken on the basis of the report, then the consumer would be entitled to disclosure without being charged for either the long distance telephone toll charge or the cost of mailing a copy of the report.[143] The provision for cost-free disclosure is designed to remove the cost deterrent as a bar to consumers seeking disclosure.[144] However, it is doubtful that the provision will accomplish its intended purpose since no corresponding provision exists for notifying the consumer of his right to cost-free disclosure. On the contrary, when the consumer is notified of his right to disclosure by the user, the opposite is implied by the words, "at nominal cost."[145] Upon notification, the average consumer cannot be expected to conclude from such language that he is entitled to disclosure without cost. It is therefore recommended that section 615(a)(1) be amended to provide such notification. Opponents of cost-free disclosure might argue that notification will encourage a flood of nuisance-motivated "collect" long-distance telephone calls from disgruntled consumers. However, the requirement that the consumer make prior written request[146] should serve as a sufficient deterrent to such conduct.

---

[138] 15 U.S.C. § 1681g(a)(1) (1970).

[139] *FCRA Hearings*, *supra* note 83.

[140] Interview with Sheldon Feldman, *supra* note 61. It is ironic that representatives of the retail investigative companies earlier used the same argument to secure the deletion of the proviso for disclosure of confidential sources. *See Hearings on H.R. 16340*, *supra* note 9, at 466-67 (statement of W. Lee Burge).

[141] S. 2360, 93d Cong., 1st Sess. § 5 (1973).

[142] Disclosures in code or trade terminology must be accompanied by an explanation.

[143] This interpretation is arrived at by reading section 5(a)(2) of S. 2360 together with the current section 612 of the FCRA.

The FTC views such telephone toll charges as a normal operating business expense which should be absorbed by the reporting company. *FCRA Hearings*, *supra* note 83.

[144] *Id.*

D. Enforcement: Putting Teeth into the FCRA

All amendments of the Act will prove futile, however, in the absence of specific enforcement provisions. Senate Bill No. 2360 seeks to enforce the legislatively imposed trust of the FCRA by delegating substantive rulemaking power to the FTC and by providing for a realistic "private attorney general" mode of redress.

Current enforcement of the FCRA has been handicapped by the inability of the Federal Trade Commission to promulgate substantive rules of law interpreting the vague language of the Act.[147] The Proxmire amendments would accord this power to the Commission.[148] However, while the FTC has in the past expressed an interest in assuming a substantive rulemaking function,[149] closing the many loopholes in the Act would require a more active role than the Commission has taken in the past.[150]

The proposed amendments would remove two other impediments to administrative enforcement of the FCRA by: (1) giving the Federal Trade Commission the power to subpoena credit bureau files for enforcement purposes[151] and (2) requiring that all investigative reports be written and retained for 1 year by the reporting agency.[152] In the past litigation the apparent conflict between the FCRA's confidentiality standards and the grant of administrative enforcement power[153] has been seized upon to deny FTC access to agency files.[154] Another device for avoiding liability for noncompliance with the Act has been the practice in some investigative agencies of making only oral reports or destroying written reports as soon as they are made.[155] With the assurance that written records will be available in future FTC investigations of the credit bureaus, administrative enforcement of the FCRA should be enhanced.

---

[145] *See* S. 2360, 93d Cong., 1st Sess. § 7(a)(1) (1973).

[146] *See* 15 U.S.C. § 1681h(b)(2) (1970).

[147] *See* note 113 *supra*. *Cf.* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), construing the Federal Trade Commission Act as empowering the FTC to promulgate rules.

[148] S. 2360, 93d Cong., 1st Sess. § 10 (1973).

[149] *Hearings on S. 823, supra* note 7, at 33 (testimony of Paul R. Dixon, Chairman, FTC). This willingness to assume the rulemaking function was accompanied by the complaint that the Commission's resources were already overtaxed and the view that assumption of the additional duty should be accompanied by increased appropriations. *Id.* at 31.

[150] The staff of the FTC has been most active in issuing informal opinions interpreting the Act's requirements, but the Commission itself has issued only six formal interpretations. COMPLIANCE WITH THE FAIR CREDIT REPORTING ACT, *supra* note 76, at 36-46. Also, the substantive rulemaking function was not mentioned in the FTC's proposed amendments to the FCRA. *See FCRA Hearings, supra* note 83.

To implement administrative regulation by the FTC, Senate Bill No. 2360 seeks to impose a real threat of civil liability on users and reporting agencies by providing for special damages in the case of negligent noncompliance with the Act.[156] By setting damages at a minimum of $100, the FCRA Amendments seek to utilize a "private attorney general" concept of private enforcement.[157]

Whether the Proxmire amendments would provide a sufficient threat to deter repeated violations of the Act is questionable. The proposed civil liability provision contains a double escape hatch. First, credit bureaus may avert liability by showing by a preponderance of the evidence that the violation was unintentional and occurred "notwithstanding the maintenance of reasonable procedures[158] to assure compliance and avoidance of error."[159] Secondly, liability is limited by the discretion of the court in awarding damages.[160] Given the difficulty in establishing negligence in such situations and overcoming the "reasonable procedures" defense, an award of $100 would be small recompense to the consumer and would pose little threat to the nationwide bureaus.

---

[151] S. 2360, 93d Cong., 1st Sess. § 11 (1973).

[152] *Id.* § 6.

[153] *Compare* 15 U.S.C. §§ 1681b(1), (f) (1970), *with* 15 U.S.C. § 1681(s) (1970).

[154] FTC v. Retail Credit Co., Civil No. 51-1250 (D.D.C., Apr. 23, 1973); Sauke v. FTC, 333 F. Supp. 1197 (N.D. Ga. 1971). Both cases deny the FTC subpoena power.

[155] 119 CONG. REC. S15604 (daily ed. Aug. 3, 1973).

[156] S. 2360, 93d Cong., 1st Sess. § 9(3) (1973). The proposed amendments would also remove the current Act's bar to common law civil actions for defamation and invasion of privacy. However, in view of the continued existence of the conditional privilege, it is doubtful that this amendment would have any significant effect. *But see* text accompanying notes 56-57 *supra*.

[157] Interview with Sheldon Feldman, *supra* note 61. While the proposed amendments to the FCRA would not impose a "private attorney general" system in the true sense of the term, they would transfer the burden of enforcing the Act from administrative regulation to private litigation. The rights of all consumers would therefore be vindicated by the actions of the few who chose to litigate.

[158] In interpreting what constitutes "reasonable procedures," courts would not be bound by the FTC's informal staff opinions. However, compliance with staff procedures ". . . would be a *relevant factor* and *could* be relied upon by a court, ..." Letter from Sheldon Feldman to Patrick Taylor, August 29, 1973. *Cf.* Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971) (staff opinions interpreting the Truth-in-Lending Act).

Viewing the judicial attitude toward the credit bureaus solely on the historical basis of the conditional privilege, it seems that courts would be extremely reticent to impose the liability from which they have consistently insulated the reporting companies. But times change. Taken out of the context of *stare decisis*, courts might be encouraged to reexamine the rationale underlying the protection of the consumer reporting agency from judicial liability. The economic disaster smokescreen would no longer be viable since credit bureaus have adequate financial resources today to institute the "reasonable procedures" which would bar liability. In the end, however, the likelihood that courts will consistently award damages in excess of $100 for negligent violations of the Act must remain a matter for future determination.

The rationale behind the "private attorney general" concept for enforcing the Fair Credit Reporting Act lies in the analogy to the Truth-in-Lending Act. By providing the same vehicles for enforcement of the FCRA as now exist under Truth-in-Lending, it is argued that a high degree of compliance will be achieved.[161] However, this analogy breaks down when an attempt is made to determine an objective formula for liquidated damages under the FCRA. Rebates of defined amounts of excess interest are provided under the Truth-in-Lending Act.[162] An award of liquidated damages in excess of $100 is therefore not a matter for judicial discretion as it would be under the proposed FCRA Amendments. In addition, whereas class actions have been an active ingredient in enforcement of the Truth-in-Lending Act,[163] the Proxmire amendments specifically preclude the use of the class action in negligent violations of the Act.[164]

---

[159] S. 2360, 93d Cong., 1st Sess. § 9 (1973).

[160] It is evident from the testimony accompanying the introduction of the proposed amendments in both the Senate and the House that the provision is intended to impose minimum liability of $100 for all violations of the Act unless a valid defense was established. *See* 119 CONG. REC. S15605 (daily ed. Aug. 3, 1973); *FCRA Hearings, supra* note 83. However, the words—"such amount of special damages as the court may allow"—preceding the provision for $100 minimum damages, suggest that the amendment could be interpreted to give the court discretion over whether or not to award special damages. It is therefore recommended that the language of this section be amended to read: "$100 for each item of erroneous information reported or such amount of special damages as the court may allow, whichever is greater."

[161] *See FCRA Hearings, supra* note 83.

[162] The Consumer Credit Protection Act provides that failure to disclose will subject the creditor to liability for "twice the amount of the finance charge" with minimum and maximum liability set, respectively, at $100 and $1000. 15 U.S.C. § 1640(a)(1) (1970).

[163] More than 75 class actions have been brought for violations of the Truth-in-Lending

Without at least the threat of a class action, it is doubtful that the civil liability provisions of the proposed FCRA Amendments will provide a sufficient deterrent to cause reporting companies to institute procedures to assure compliance with the Act. While small, local credit bureaus might be intimidated by the proposed amendments, experience has shown that the most flagrant violators of the Act and of the consumer's rights are the large nationwide companies which furnish investigative reports. The effect of several $100 judgments on these companies would be negligible. Further, without the prospect of increased awards, there will be no significant incentive for attorneys to litigate.[165]

However, the advantages of stricter compliance must be weighed against the practical difficulties of authorizing the class action. First, class actions would require extensive discovery proceedings and would therefore necessitate considerable delay in litigation.[166] Secondly, class actions for negligent noncompliance could expose credit bureaus to bankrupting liability.[167] Class actions might thus deprive credit bureaus of an opportunity to correct their procedures and deny them a "second chance." However, this argument ignores several mitigating factors: (1) the duties imposed on consumer reporting agencies by the proposed FCRA Amendments are relatively minor in comparison with those of the merchant who orders the report; (2) the "reasonable procedures" which would have to be set up to accomplish these minimal duties and thus avert liability would not be unduly burdensome; (3) this same liability to class actions was included in the Truth-in-Lending Act and has not

---

Act. *FCRA Hearings*, *supra* note 83.

[164] Whether Senate Bill No. 2360 would allow recovery of special damages for negligent noncompliance in class actions is subject to dispute. By a literal reading of the bill, the specific inclusion of the words—"in an individual action"—suggests that consumers may not recover special damages for negligent noncompliance in class actions. S. 2360, 93d Cong., 1st Sess. § 9(1) (1973). However, the opposite conclusion is suggested by the discussion of class actions in the statements of one of the legislative draftsmen of the proposed amendments who merely limits the application of the $100 minimum amount of recovery to "individual as distinguished from class actions." *FCRA Hearings*, *supra* note 83. In view of the policy of judicial restraint exercised in past consumer class actions, however, it is doubtful that the allowance of special damages without setting any minimum amount of recovery will afford meaningful relief to the consumer.

[165] Proponents of liability limited to individual actions argue that this will provide sufficient incentive for attorneys to take cases. *FCRA Hearings*, *supra* note 83.

[166] *See, e.g.*, Millstone v. National Inspection Bureau (O'Hanlon Reports), No. 72C-224 (E.D. Mo., filed Apr. 11, 1972) (discovery made May 26, 1972). *See also* McNamara, *supra* note 72, at 100 n.187, for description of the facts in *Millstone*.

[167] *Cf.* Kriger v. European Health Spa, Inc., 4 CCH CONSUMER CREDIT GUIDE ¶ 99,106 (E.D. Wis. July 18, 1972).

had an economically disastrous impact on creditors; and (4) where class actions would have a bankrupting effect, courts can be relied upon to exercise judicial restraint. A third argument against allowing class actions for negligent noncompliance is that the judiciary would oppose such a policy as unfair to credit bureaus, just as class actions have been opposed under the Truth-in-Lending Act. However, this argument ignores the common denominator of those cases which have denied class actions under the Truth-in-Lending Act. Where the violation of Truth-in-Lending was merely technical and was made in good faith, the courts have expressed a willingness to interpret the congressional intent as limiting use of the class action to situations where it would not have a bankrupting effect.[168] Such an interpretation does, of course, represent judicial legislation in the most blatant sense. But allowance for such equitable considerations would be provided under the proposed amendments by the "reasonable procedures" bar to liability. Judicial restraint would, therefore, benefit rather than impede enforcement of the Act against the large retail credit bureaus which would not be affected by the limited liability in individual actions.

In summary, the need for authorization of class actions to enforce the FCRA is perhaps best expressed by the following statement of the National Consumers League:

> The mere threat of private suits could be the strongest deterrent . . . . Legislation which gives a . . . consumer the legal right to get a judgment against a company is not enough, since the cost of obtaining such a judgment for a small claim is too high to justify the pursuit.[169]

V. SUPPLEMENTAL STATE LEGISLATION

Federal amendments to the FCRA would be preferable to state legislation since this would eliminate the possibility of jurisdictional conflicts arising from the activities of nationwide reporting companies. However, if Senate Bill No. 2360 should, like its predecessors, prove to be a victim of the legislative scalpel wielded by the credit bureau lobbies, then supplemental state legislation would be appropriate.

There is a conflict of authority as to whether the Fair Credit Reporting Act preempts state legislation. While the Truth-in-Lending Act specifically authorized stricter state legislation in that area, the FCRA is silent on this issue.[170] While a literal reading of the statute suggests that contradictory state provisions are preempted by the federal Act, state officials have advanced the proposition that stricter state laws will govern.[171]

---

[168] *See, e.g., id.*; Shields v. Valley Nat'l Bank, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,196 (D. Ariz., Apr. 24, 1972); Kenney v. Landis Fin. Group, Inc., 4 CCH CONSUMER CREDIT GUIDE ¶ 99,105 (N.D. Iowa, Mar. 30, 1972); Rogers v. Coburn Fin. Corp., 4 CCH CONSUMER CREDIT GUIDE ¶ 99,234 (N.D. Ga., Feb. 18, 1972); Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971). *Contra*, Katz v. Carte Blanche Corp., 4 CCH CONSUMER CREDIT GUIDE ¶ 99,010 (3d Cir., May 22, 1973); Joseph v. Norman's Health Club, Inc., 336 F. Supp. 307 (E.D. Mo. 1971).

[169] *Hearings Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 365 (1970).

Following the enactment of the FCRA, only eight states have enacted fair credit reporting acts.[172] The sole[173] bill introduced into the Mississippi Legislature on this subject provided for punitive damages in the case of any agency which failed to correct alleged errors in a credit report within 5 days of notification. In view of the brevity of the period for reinvestigation and the harshness of the penalty imposed, it is not surprising that the bill did not pass in the committee vote.[174] Future Mississippi legislation, drafted in more temperate terms, could serve to close the gap in the federal legislation.

VI. CONCLUSION

The Fair Credit Reporting Act Amendments proposed by Senator Proxmire go much further than the current Act toward rectifying the consumer's position of impotency in dealing with the credit bureaus. But do they go far enough? The viability of the sanctions provided by Senate Bill No. 2360 depends in large part upon the willingness of the Federal Trade Commission to promulgate meaningful guidelines and of the courts to award extensive damages for repeated violations of the Act. If both the FTC and the courts perform these functions, then the Fair Credit Reporting Act Amendments may prove sufficient by themselves to vindicate the rights of the consumer. However, the alternatives which have been suggested provide a means of reducing this intuitive factor without unfairly burdening the credit bureaus.[175] The judiciary has provided the impetus for change with the fifth circuit's decision in *Hood v. Dun & Bradstreet, Inc.*[176] The time has now come for the legislature to reassess the balance that was struck more than a century ago[177] between the business community's interest in an inexpensive reporting system and the individual's right to privacy and freedom from defamation.

---

[170] *Compare* 15 U.S.C. § 1633 (1970), *with* 15 U.S.C. § 1681t (1970). *See also* B. CLARK & J. FONSECA, *supra* note 114, at 191.

[171] *See* 4 CCH CONSUMER CREDIT GUIDE ¶ 99,257 (1972), announcing the Oklahoma Attorney General's intention to enforce OKLA. STAT. ANN. tit. 24, § 82 (1965), which requires pre-dissemination disclosure to all subjects of credit reports.

[172] *See* ARIZ. REV. STAT. ANN. §§ 44-1691 to -1696 (Supp. 1971); CAL. CIV. CODE tit. 1.5, §§ 1750-1757 (West Supp. 1972); CONN. GEN. STAT. ANN. §§ 36-431 to -435 (1971); MASS. GEN. LAWS ANN. ch. 93, §§ 50-65 (1972); N.H. REV. STAT. ANN. ch. 583 (Supp. 1973); N.M. STAT. ANN. §§ 50-18-1 to -8 (Supp. 1973); N.Y. GEN. BUS. LAW §§ 370-76 (McKinney Supp. 1973); TEX. PENAL CODE art. 1546(b), §§ 1-3 (1972). For a comparative analysis of early state legislation, see Comment, *The Consumer vs. the Credit Bureau: Whom Does the Law Protect?*, 7 CAL. W.L. REV. 216, 223-31 & Appendix (1970).

[173] Letter from Frances Hicks, Clerk of the Mississippi House of Representatives, to Patrick Taylor, May 28, 1973.

[174] H.B. No. 186, Miss. (1971). Reported "DO NOT PASS" by the Judiciary B Committee. *Cf.* ARIZ. REV. STAT. ANN. § 44-1946D (Supp. 1971), providing a 15-day period for reinvestigation or correction of alleged errors.

Patrick Taylor

---

[175] *See* text accompanying notes 167-68 *supra*.

[176] Civil No. 72-1233 (5th Cir., Sept. 14, 1973).

[177] *See* Ormsby v. Douglass, 37 N.Y. 477 (1868).

APPELLATE COURT REFORM

I. Introduction

The function of the highest court of a jurisdiction in dealing with the cases which come before it is twofold: to correct errors made in the determination of the rights of the instant litigants and, more importantly, to determine the standards by which persons within the jurisdiction are to conduct their affairs.[1] Where such a court is delayed in the performance of the first function or has inadequate time in which to properly accomplish the second, the ends of justice are not served.[2] An increase in the workload of the highest court of a jurisdiction will either reduce the amount of time which may be spent on any one case or increase the time required to dispose of all of the cases before it.[3] A substantial increase will, no doubt, effect both functions. Delay, which usually results from congestion, has been regarded by most judicial reformers as inherently evil.[4] It causes prejudice to the litigants and reduces the respect for the legal system as a whole.[5] The exact effect of appellate court congestion on the lawmaking function of the court has been little noted probably because of the lack of an adequate measurement system.[6] It must be assumed, however, that where the highest court of a jurisdiction is severely congested, not only will delay result but also the time that may be spent in considering each case will also decrease.

Over the past few years the workload of nearly every high court has substantially increased.[7] Mississippi's high court is certainly among them.[8] Additionally, there is no reason to suspect that this surge of work at the appellate level will subside. Society is daily becoming more complex, requiring more precise definitions of rights and liabilities.[9] The area of individual rights has been greatly expanded and the burden of their administration has been cast upon the states.[10] Modern law[11] and increased wealth[12] allow more litigants access not only to the trial level but also to the appellate level of our court systems.

---

[1] Second Biennial Report of the Judicial Council of Oregon 18 (December 2, 1968); *see* Dodd, *The Problems of Appellate Courts*, 6 Am. L. School Rev. 681, 684 (1929); Winters, *New Approaches to Appellate Court Problems*, 18 La. B.J. 29 (1970).

[2] > [I]nterminable and unjustifiable delays in our courts are today compromising the basic legal rights of countless thousands of Americans and, imperceptibly, corroding the very foundation of constitutional government in the United States.

Warren, *The Problem of Delay: A Task for Bar and Bench Alike*, 44 A.B.A.J. 1043 (1958).

[3] *See* Hazard, *After the Trial Court—the Realities of Appellate Review*, The American Assembly, The Courts, the Public and the Law Explosion 76 (H. Jones ed. 1965).

[4] *E.g.*, Knickerbocker Printing Corp. v. United States, 75 S. Ct. 212 (Jackson, Circuit Justice, 1954) (". . . delayed justice [is] little less than scandalous."); American Judicature Society, Intermediate Appellate Courts 1 (Rpt. No. 20, August 1967).

[5] Hazard, *supra* note 3, at 61-62.

[6] *But see* Groot, *The Effects of an Intermediate Court on the Supreme Court Work Product: The North Carolina Experience*, 7 Wake Forest L. Rev. 548, 562-64 (1971). This article proposed a system to measure a change in work product (a measure of the consideration given cases by a court using objective standards; *e.g.*, thoroughness of research) after some modification in the judicial system.

The work of the Mississippi Supreme Court over the last few years has increased substantially. In 1969 the court was required to make 540 dispositions of matters brought before it.[13] By 1973 this number had increased to 849.[14] Since 1971 the court has been required to extend its term and to hear petitions and motions during vacation to keep abreast of its docket.[15] The length of time from the filing of the record with the court to the decision of the case has increased from 239 days in 1972[16] to 256 days in 1973.[17] It is also worthy of note that the use of per curiam opinions by the court has increased substantially since the 1971 term.[18]

The purpose of this writing is to review some of the methods which have been used in reducing the workload of appellate courts and to make recommendations based on this review. The methods reviewed will be discussed in two catagories: (1) those which increase the efficiency of the court, and (2) those which reduce the amount of work required of the judges of the highest court.

II. INCREASE IN EFFICIENCY

A. *Court Administration*

"The importance of capable and efficient administrative assistance for an effective court system is second only to the importance of having competent judges."[19] In order for judges to exercise their judicial function more effectively, they should be relieved of as many non-judicial functions as possible; subject only to the preservation of the integrity of the court.[20] Such non-judicial duties are commonly referred to as "judicial housekeeping,"[21] although their scope is usually broader than the term implies.[22]

---

[7] *See* INTERMEDIATE APPELLATE COURTS, *supra* note 4, at 1; COUNCIL OF STATE GOVERNMENTS, WORKLOADS OF STATE COURTS OF LAST RESORT (1962); FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 1-6 (December 1972).

[8] *See* Eighth Annual Statistical Report of the Mississippi Supreme Court (1973).

[9] *See* INTERMEDIATE APPELLATE COURTS, *supra* note 4, at 2 n.7.

[10] *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainright, 372 U.S. 335 (1963).

[11] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).

[12] INTERMEDIATE APPELLATE COURTS, *supra* note 4, at 2.

[13] Eighth Annual Report, *supra* note 8, at 9.

[14] *Id.*

[15] *Id.* at 1.

[16] Seventh Annual Statistical Report of the Mississippi Supreme Court (1972).

[17] Eighth Annual Report, *supra* note 8, at 3.

[18] *Id.* at 11. The court used 71 per curiam opinions in disposing of 397 cases on their merits in 1971 (or 18 percent). In 1973 the court used 155 per curiam opinions in disposing of the same number of such cases (or 39 percent).

The performance of non-judicial duties by judicial officers carries with it a heavy burden of justification. In Mississippi, it has been conservatively estimated that between one-third to one-half of the total time of the chief justice is consumed with handling administrative matters.[23] However, the chief justice himself has indicated that time spent on non-judicial matters may well exceed 50 percent of his total productive man-hours.[24] It has also been estimated that the presiding justice spends between one-fourth to one-third of his time on similar matters.[25] This, along with the routine administrative duties handled by each associate justice,[26] effectively reduces the manpower of the supreme court by at least one member. The problem is obvious; the Mississippi Supreme Court is in urgent need of assistance in the management of its non-judicial business affairs, so that it may go about the business of administering justice on a full-time basis.

Of course, this dilemma is not unprecedented. Other states have been faced with the same problems, and many have taken action to counteract them. As early as 1906, the late Roscoe Pound of the Harvard Law School cautioned against the "waste of judicial power"[27] and, in 1940, he called for the "conservation of judicial power" through the use of administrators and modern business methods.[28] In 1922, the federal judiciary took affirmative action by the establishment of the Judicial Conference of Senior Circuit Judges.[29] This subsequently led to the establishment of the Administrative Office of the United States Courts in 1939.[30]

---

[19] ABA COMM. ON STANDARDS OF JUDICIAL ADMINISTRATION, COURT ORGANIZATION § 1.40, commentary (Tent. Draft 1973) [hereinafter cited as ABA STANDARDS, COURT ORGANIZATION].

[20] Uhlenhopp, *Better Management of the Judicial System,* 5 TRIAL JUDGES' J. 23 (1966).

[21] McConnell, *The Administrative Office of the Courts of New Jersey,* 14 RUTGERS L. REV. 290, 295 (1960).

[22] For example, in New Jersey such duties include: collection and publication of statistics, assignment of judges, fiscal and budget maintenance, personnel supervision, handling of public relations, Secretariat for the Judicial Conference, and other special projects and duties, as the chief justice sees fit. N.J. STAT. ANN. §§ 2A:12-1 to 12-6 (1952); *see* McConnell, *supra* note 21, at 290-301.

[23] MISS. JUDICIARY COMM'N, REPORT OF THE MISS. JUDICIARY COMM'N TO THE 1970 REGULAR SESSION OF THE LEGISLATURE OF THE STATE OF MISSISSIPPI 9 (1970) [hereinafter cited as MISS. JUDICIARY COMM'N REPORT].

[24] Interview with Chief Justice Robert Gillespie of the Mississippi Supreme Court, in Jackson, Miss., June 28, 1973 (on file at the MISS. LAW JOURNAL) [hereinafter cited as Interview with Chief Justice Gillespie].

However, the chief justice also expressed his opinion that, even if a court administrator was established, the chief justice (and the presiding justice to a more limited degree) would still be required to perform certain non-judicial duties.

[25] MISS. JUDICIARY COMM'N REPORT 9.

[26] Interview with Chief Justice Gillespie, *supra* note 24.

Meanwhile, in the state court arena, there likewise began movements, in one form or another, to provide administrative assistance to appellate courts. North Dakota began the race by creating the office of "executive secretary" for its newly created judicial council.[31] Soon after the Administrative Office of the United States Courts was established, equivalent departments in the state systems began to emerge more readily. A "Model Act to Provide for an Administrator for the State Courts" was promulgated and adopted in 1948[32] and amended in 1960.[33]

As of July 1970, at least 39 jurisdictions[34] had created some sort of position which served the function of a court administrator. These positions varied among the states in their scope of responsibility, qualifications, and titles. The concept of a court administrator has been recognized as beneficial by almost every modern court system.[35] Consequently, there appears to be a trend emerging to enact legislation creating such positions[36] in those states which presently do not have court administrators. At least two model judicial articles have felt the need to incorporate provisions establishing court administrators.[37]

---

[27] Pound, *The Causes of Popular Disatisfaction with the Administration of Justice,* 40 AM. L. REV. 729 (1906).

[28] R. POUND, ORGANIZATION OF THE COURTS 275-76 (1940). *See also, Some Principles of Procedural Reform,* 4 NW. U.L. REV. 388, 389 (1910); Clark, *Judicial Reform in Connecticut,* 5 CONN. L. REV. 1, 3 (1972).

[29] Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 838 (1922).

[30] Act of Aug. 7, 1939, ch. 501, 53 Stat. 1223 (1939), *as amended* 28 U.S.C. §§ 601-11 (1968).

There is a wealth of information written on the Administrative Office of the United States Courts. *See, e.g.,* Chandler, *The Direction of Administration of Trial Courts,* 21 F.R.D. 65 (1958); Chandler, *The Administration of the Federal Courts,* 13 LAW & CONTEMP. PROB. 182 (1948); Chandler, *The Administrative Office of the U. S. Courts,* 4 F.R.D. 488 (1946); Medina, *The Work of the Administrative Office of the United States Courts,* 11 F.R.D. 353 (1952).

[31] N.D. CENT. CODE § 27-15-03 (1960). However, this position is not a "court administrator" in the true sense of the word, since the duties performed are quite limited in comparison with those of most modern administrators.

[32] HANDBOOK OF THE NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS 165 (1948). This act has been subsequently adopted by three jurisdictions: Illinois, Michigan, and Washington. HANDBOOK OF THE NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS 373 (1970).

[33] HANDBOOK OF THE NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS 172 (1960). The amended act has been adopted by Oklahoma. HANDBOOK OF THE NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS 373 (1970).

[34] THE COUNCIL OF STATE GOVERNMENTS, STATE COURT SYSTEMS 70-71 (1970).

[35] *See, e.g.,* ABA STANDARDS, COURT ORGANIZATION, *supra* note 19, § 1.40.

The use of court administrators in the states has been extensive, though the degree of responsibility has varied among the different systems. Often the extent of authority can be categorized by the style of the title of the department head. For instance, the court administrator of Iowa is designated a "court statistician" whose duties are apparently limited to data accumulation and statistical analysis.[38] One state has created the office of "deputy administrator" to perform the non-judicial functions of the justice of the peace in that state.[39] Under that system, the administrator, who must be a member of the bar, is appointed by the Governor, and confirmed by the senate. His duties are limited to assisting in the management of the justice of the peace courts. Titles used in other states are "executive secretary,"[40] "chief court administrator,"[41] and "administrative director."[42] The fact that only four states

---

[36] *See* Clark, *The Sixties — A Historic Decade in Judicial Improvement,* 36 Brook. L. Rev. 331 (1970); Commentary, *Court Administrators: The Newest Profession,* 10 Duq. L. Rev. 220 (1971).

[37] ABA Model Judicial Article § 8, in Winters, *A.B.A. House of Delegates Approves Model Judicial Article,* 45 J. Am. Jud. Soc'y 279 (1962); Nat'l Municipal League, Model State Constitution § 6.05 (6th ed. 1963).

The Advisory Commission on Intergovernmental Relations has also supported such a position. The Commission further recommended the establishment of such offices in general trial courts of large urban areas, under the general supervision of the state court administrator.

A very helpful analysis of the scope of the office and its commensurate duties may be found in the American Bar Association Standards on Judicial Administration. *See* ABA Standards, Court Organization, *supra* note 19, §§ 1.41 to .42.

[38] Iowa Code Ann. §§ 685.6-.10 (Supp. 1973). However, under section 685.8, the Statistician may perform other administrative duties, in that he is directed to "[a]ttend to such other matters as may be assigned by the chief justice and the supreme court."

[39] Del. Code Ann. tit. 10, §§ 126-27 (Supp. 1970).

[40] Tenn. Code Ann. §§ 16-325 to -329 (Supp. 1972). The executive secretary, as contemplated by the statute, works as an assistant to the chief justice and performs such duties as are assigned by the chief justice or by statute. However, the duties assigned by the statute deal primarily with fiscal and budgetary matters, and do not include such matters as reassignment of trial judges, or scheduling or calendaring of either trial court or supreme court business.

[41] Conn. Rev. Gen. Stat. § 51-2 (Supp. 1973). The State of Connecticut is unique in its establishment of this position. The chief court administrator is nominated by the Governor from among the judges of the supreme court, subject to the approval of the general assembly. He serves for a period of 4 years, during which time he performs solely non-judicial functions.

However, within this same judicial organization, there is an office of "executive secretary." *Id.* § 51-8. The executive secretary is also charged with the administration of have adopted the Model Act[43] is not indicative of poor planning or even lack of uniformity. No two states are exactly alike. Each has its own court system and its own problems. Thus, whether a particular administrator program is suitable for a particular state depends upon the particular characteristics of that state's court system—for example, structure and organization of the court system, workload of the courts, level of competence of the judiciary and the bar, degree of congestion and delay, size of the judicial system, and others.[44] Thus, a prerequisite to the establishment of any administrative system is a thorough analysis of the present and future needs of the entire judicial system.

There exists a wide variety of functions and duties of court administrators. Some of these duties are concerned with managerial problems at the trial level.[45] Others concern managerial problems at the appellate level, and include: (1) general direction of management of the non-judicial affairs of the court system; (2) evaluation of the organization, practices, and procedures of the court system; (3) calendar management; (4) recruitment, selection, and supervision of non-judicial personnel, including disciplinary matters; (5) management of auxiliary services; (6) budget and fiscal management; monitoring of court activities through statistical accumulation and analysis, and providing an annual report of the activities of the court, as well as the court manager; (7) long-term and short-term planning for future and present needs; (8) management of records, facilities, and equipment; (9) serving as secretariat of the judicial council; (10) responsibility for publication of court opinions, and other "word-processing" activities; (11) handling information requests and complaints, and serving as a general public relations officer; (12) conducting special projects (such as state-wide surveys of

---

the non-judicial business of the judicial department. The result is a loss of human and judicial resources.

[42] *E.g.*, ALAS. CONST. art. IV, § 16; ARIZ. CONST. art. VI, § 7; N.J. STAT. ANN. § 2A:12-1 to 12-6 (1952).

Characteristically, when created by statute, these positions encompass a broad spectrum of management functions. *See* AMERICAN JUDICATURE SOCIETY, COURT ADMINISTRATORS, THEIR FUNCTIONS, QUALIFICATIONS AND SALARIES (July 1966).

[43] *See* notes 32 & 33 *supra*. The fact that the act is a "model" act rather than a "uniform" act is indicative of the general opinion that uniformity is not necessary. However, there is a discernible trend toward uniformity in the functions and duties of the court administrator. Commentary, *supra* note 36, at 222.

[44] *See generally* AMERICAN JUDICATURE SOCIETY, *supra* note 42; Commentary, *supra* note 36, at 220.

[45] Since Mississippi does not have a "unified" judiciary (one in which the law and equity functions are combined and the administration of the entire system is vested in the highest court in the system) the impact of a court administrator upon the management problems at the trial level may not be as effective as it has been in other states. Interview with Chief Justice Gillespie, *supra* note 24.

costs of legal services for indigents); and (13) such additional duties as the chief justice of the supreme court may request.[46] In order to relieve congestion at the trial level, the court administrator, in some states, is given the additional duty to investigate the various trial court dockets and make temporary assignments of trial judges, subject to the approval of the supreme court (or the chief justice).[47] Thus the functions provided by court managers can be beneficial to both the trial and appellate judiciary.

In analyzing the major facets of an administration and management system for the judiciary, the first question that arises is who should be the chief administrative officer? Most states designate the chief justice of the supreme court as the administrative head of all the courts of the state.[48] Even so, there is some measure of autonomy allowed court managers.[49] It is self-evident that a central figure of authority and responsibility is necessary. The chief justice, or the supreme court justices collectively, should head the administration of the judiciary, and have broad powers to direct the policy and scope of activities of the court manager. However, the manager must be allowed some discretion to discharge the duties of his office, namely, the management of the non-judicial matters of the court. A court administrator is a professional, trained to manage the business and administrative affairs of the court, just as a judge is trained to manage the substantive judicial affairs of the court. "[N]either a judge nor his staff members can be expected to know as much as they should about the art and science of administration any more than a physician, surgeon, or nurse can be expert in the administration of a hospital."[50] Professional business managers should be brought into the system in order to fully benefit from the use of modern management techniques.[51] This cannot ordinarily be achieved by designating a member of the bench to be the court manager, or requiring the manager to be a member of the bar. Certainly, such experience would be helpful, but it would not be sufficient without the specialized training in management techniques obtained by public administrators.[52] However, some training in law is necessary in order that the manager be aware of the substantive and procedural rights affected by his management decisions.

---

[46] *See* ABA STANDARDS, COURT ORGANIZATION, *supra* note 19, at § 1.40; AMERICAN JUDICATURE SOCIETY, *supra* note 42, at 2-5; MISS. JUDICIARY COMM'N REPORT 9-12; 1960 HANDBOOK, *supra* note 33, § 5, at 175; Commentary, *supra* note 36, at 221-26.

[47] *See, e.g.*, N.J. STAT. § 2A:12-3 (1952). This would appear to be particularly effective in a state such as Mississippi, where there are both rural and urban trial districts, and a resultant disparity in the caseload.

However, in order to temporarily utilize a judge from another district, the term time of the court may have to be extended, provided that general legislation to eliminate fixed terms of court is not adopted. *See* MISS. JUDICIARY COMM'N REPORT 11. The Mississippi Supreme Court has held void a judgment rendered in an extended court term which overlapped into the term time of another county. Murphy v. State, 253 Miss. 703, 178 So. 2d 692 (1965).

At the present time, an experimental trial court administrator is being used for several courts on the Mississippi Gulf Coast. Interview with Prof. N.S. Sweat, Jr., in Oxford, Miss., Sept. 19, 1973.

[48] *E.g.*, ALAS. CONST., art. IV, § 16; ARK. STAT. ANN. §§ 22-142 to -143 (Supp. 1969); ILL. CONST. art. VI, § 16.

[49] N.J. CONST. art. VI, § 7; N.J. STAT. ANN. §§ 2A:12-1 to 12-6 (1952).

[50] *The Professionalization of Court Administration*, 50 J. AM. JUD. SOC'Y 256, 257 (1967) (editorial).

One of the problems of establishing a court administrator system has been the resistance of the bench and bar. "The antipathy . . . stems not only from varying perceptions of reality and from fears . . . of an impingement on their (judges' and lawyers') professional realm, but also from a lack of knowledge of what management *is* and what role a court manager would play in the legal system."[53] However, these misconceptions and prejudices are apparently diminishing as evidenced by the spectacular increase of court-administrator positions in the last two decades.[54]

The need for the court manager in the modern judicial system cannot be denied. It is accepted that the judiciary should use the assistance of modern management techniques in the performance of its nonjudicial business, in order to expedite its judicial matters.[55] Since Mississippi currently has no assistance in the administration of its nonjudicial affairs, consideration should be given to the creation of a court-administrator position.

---

[51] Senator Tydings of Maryland, a firm advocate of the use of court administrators, suggests the introduction of management consultants and systems analysts in solving the problems of achieving effective management, organization, and operation of a court system. Tydings, *Modernizing the Administration of Justice*, 50 J. AM. JUD. SOC'Y 258 (1967). *See also* J. REED, THE APPLICATION OF OPERATIONS RESEARCH TO COURT DELAY 1-11 (1973).

The Senator once proposed the creation of the "Office of Judicial Assistance" to act as a national clearinghouse for developments in court administration, to establish a program of grants-in-aid to states to assist in establishing court administration programs, and to study the adoption of management techniques to state court systems. S. 1033, 90th Cong., 1st. Sess. (1967) (The National Court Assistance Act). For text and discussion of the bill, see 113 CONG. REC. 3930 (1967).

[52] The general call for a national effort in establishing a program of education specifically designed for court administrators has been made. Burger, *Court Administrators — Where Would We Find Them?*, 53 J. AM. JUD. SOC'Y 108 (1969); Saari, *Management and Courts; A Perplexing Nexus*, 20 AM. U.L. REV. 601 (1970); *The Professionalization of Court Administration*, 50 J. AM. JUD. SOC'Y 256 (1967) (editorial).

A response has also been made to the call by the establishment of a court administration program of education at the Institute of Court Management, University of Denver, leading to a degree of Master of Public Administration in Judicial Administration. *See* Brownell, *A Development Program for Court Administration*, 54 J. AM. JUD. SOC'Y 99 (1970); Report of the Dean, University of Denver College of Law (date unknown).

[53] Saari, *supra* note 52, at 604.

[54] Commentary, *supra* note 36, at 233.

[55] Furthermore, in one state the use of a court administrator has reduced the number

B. The Rule-Making Power of the Court

"Modernization of court procedures is an urgent need."[56] "The present hodge-podge of confusing, scattered statutes, court rules, and case decisions which embody our practice and procedural rules are sadly in need of a carefully studied and thorough reworking."[57] Although Mississippi practice and procedure is largely regulated by statute, and has had no significant changes since 1924,[58] there has been a long and continued cry for the supreme court to use its inherent rule-making power to establish procedural rules.[59]

The use of such power would enable the court to simplify and bring into uniformity the rules of each court; *i.e.,* circuit court, thereby resulting in increased efficiency for the entire judicial system. The scope of these rules is, of course, limited to control over court procedures for enforcing substantive rights and cannot affect substantive rights themselves.[60] This includes the areas of pleading, discovery, third-party practice, rules of evidence, and forms of process and writs.[61]

The judicial branch of the government should be allowed to make rules for carrying out its judicial business, just as the legislature makes its own rules. This is consistent with the Mississippi Constitution[62] and

---

of personnel required, even in the face of an increasing volume of litigation. *See* McConnell, *supra* note 21, at 302.

[56] Address by Chief Justice Robert Gillespie to the Miss. State Bar, June 8, 1973.

[57] Franck, *Practice and Procedure in Mississippi: An Ancient Recipe For Modern Reform,* 43 MISS. L.J. 287 (1972).

[58] MISS. JUDICIARY COMM'N REPORT 15; *see* Address by Chief Justice Gillespie, *supra* note 56.

[59] *See, e.g.,* Ethridge, *Improving the Machinery of Justice,* 37 MISS. L.J. 506, 508 (1966); Franck, *supra* note 57, at 287; MISS. JUDICIARY COMM'N REPORT 15. *Contra, Report on the Special Committee on the Proposed Civil Procedure Act of 1944,* 16 MISS. L.J. 335, 336 (1944). *See generally* Dowling, *The Inherent Power of the Judiciary,* 21 A.B.A.J. 635 (1935); Joinder and Miller, *Rules of Practice and Procedure, A Study of Judicial Rule-Making,* 55 MICH. L. REV. 623 (1957); Pound, *The Rule-Making Power of the Court,* 12 A.B.A.J. 599 (1926); Tyler, *The Origin of the Rule-Making Power and Its Exercise by Legislators,* 22 A.B.A.J. 772 (1936). *See also* AMERICAN JUDICATURE SOCIETY, THE JUDICIAL RULE-MAKING POWER IN STATE COURT SYSTEMS (Oct. 1967).

[60] Franck, *supra* note 57, at 303; *See also* Note, *The Judiciary and the Rule-Making Power,* 23 S.C.L. REV. 377, 385 (1971).

[61] *See* Franck, *supra* note 57, at 303.

[62] MISS. CONST. art. 6, § 144, provides that "The Judicial Power of the state shall be vested in a Supreme Court. . . ."

MISS. CONST. art. 1, § 2, provides that "No person or collection of persons, being one the body of case law of the state.[63] "Moreover, a wholly codified system of pleading, practice and procedure is by definition relatively inflexible since changes in it necessarily involve extensive studies by a legislature already overloaded with important non-judicial problems . . . ."[64] Although it may be preferable for the legislature to take the initiative and "define" the court's rule-making power,[65] it is not necessary.[66] The supreme court has this power inherently and has not abrogated it through its non-use.[67] If the legislature does not take some action, then it ". . . may develop that the Court, in order to carry out its constitutional function, will be required to alter its views . . ." and assume the rule-making power historically exercised by Mississippi's legislature.[68]

C. Oral Argument

The use of oral arguments can provide substantial assistance to an appellate court in focusing on the relevant issues in a case and avoiding those with little merit. As in many jurisdictions,[69] the Mississippi Supreme Court presently permits oral argument in all cases before the

---

or belonging to one of these departments (legislative, judicial or executive), shall exercise any power properly belonging to either of the others . . . ."

[63] In the leading case of Southern Pac. Lumber Co. v. Reynolds, 206 So. 2d 334 (Miss. 1968), Chief Justice Ethridge asserted, by dictum, that: "[T]he phrase 'judicial power' . . . in section 144 includes the power to make rules of practice and procedure . . . ." *Id.* at 335. *See also* Gulf Coast Drilling & Exploration Co. v. Permenter, 214 So. 2d 601 (Miss. 1968).

[64] MISS. JUDICIARY COMM'N REPORT 16.

[65] In the 1973 legislative session, H.B. 18, passed by the house of representatives, purported to "define" the rule-making power of the supreme court to prescribe general rules of practice and procedure. The bill would have provided for an advisory committee to study and recommend rules of civil procedure to the supreme court. The rules approved by the court would then become effective, taking precedence over conflicting statutes, unless the legislature disapproved the rules, in whole or in part, in the next legislative session.

Although the bill was passed by the house, it died in the senate judiciary committee. A duplicate version of this bill will be prefiled by State Senator Troy Watkins. Interview with State Senator Troy Watkins, in Natchez, Mississippi, June 29, 1973.

[66] Although an act by the legislature is not required, it would be preferred in order to preserve the harmonious relations between the two branches of government. An additional advantage of legislative enactment would be the creation of an advisory committee to study and promulgate procedural rules since there is some doubt whether the court could physically manage the task without the aid of such a committee, or similar advisory body.

[67] *Id. See* Franck, *supra* note 57, at 288-89.

[68] Address by Chief Justice Gillespie, *supra* note 56.

[69] *See* Phillips, *Appellate Review in the Sixth Circuit,* 2 MEMPHIS ST. L. REV. 1, 12 (1971); Stuart, *Iowa Supreme Court Congestion: Can We Avert a Crisis,* 55 IOWA L. REV. 594 (1970); Comment, *Solution for the Backlog of the Supreme Court of Colorado,* 36 U. COL. L. REV. 545, 552 (1964).

court.[70] However, the court does reserve the right to set time limits, which serve as a control on frivolous appeals.[71]

Though internal procedures of the supreme court have been overhauled in recent years,[72] the use of the conference system has been retained.[73] One day each week, Thursday, is devoted solely to hearing oral arguments and panel discussion. Though this is a time-consuming process, using about one-fifth of the court's time, it is felt by the court that ". . . it is one of the most essential aspects of appellate procedure."[74]

Although in Mississippi there is apparently no need to do so,[75] other courts have taken measures to limit the use of oral arguments when a decision can be adequately made on the basis of the briefs alone. The Fifth Circuit Court of Appeals has adopted rules that provide for "screening" of cases by the judges, prior to the hearing, to determine whether or not oral argument should be allowed.[76] This process is known as docket control.[77] When the judges screen the cases, they classify them as either Class I, II, III, or IV cases. Class II cases are placed on the "Summary Calendar,"[78] the effect of which is to decide the case solely on the basis of the briefs.[79] The remainder of the cases, those in Class I,

---

[70] MISS. SUP. CT. R. 7(e). *But see* RULE 16(b) whereby the court does not allow oral argument on motions except when suggested by the court.

[71] MISS. SUP. CT. R. 10. However, the chief justice has indicated that at the present time the bar is sufficiently regulating oral arguments and there are few, if any, frivolous appeals being argued before the court. Interview with Chief Justice Gillespie, *supra* note 24.

[72] Address by Chief Justice Gillespie, *supra* note 56.

[73] *Id.*

[74] *Id.*

[75] *See* note 71 *supra.*

[76] FIFTH CIRCUIT R. 17-20. These rules are entirely consistent with the spirit of Rule 34(b) of the Federal Rules of Appellate Procedure which provides: "Time Allowed for Argument. *Unless otherwise provided by rule* for all cases or for classes of cases, each side will be allowed 30 minutes for argument . . . ." (emphasis added). The actual screening of cases is done by the judges on the panel assigned to decide the merits. They categorize the cases into one of four classes, while they are reviewing the record.

[77] *See id.* R. 17, which provides that: "[T]he Chief Judge may . . . appoint . . . panels to review pending cases for appropriate assignment or disposition under Rules 18, 19 or 20 . . . ."

[78] *Id.* R. 18 (a), which provides as follows: "Whenever the court, *sua sponte* or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar." *See* Murphy v. Houma Well Serv., 409 F.2d 804 (5th Cir. 1969).

[79] Chief Judge Brown of the Fifth Circuit reports that during the first 6 months of operation of Rule 18, approximately one-third of all cases appealed were categorized as Class II cases, and disposed of without oral argument. *Hearings on S. 952, S. 567, S. 474, S. 585, S. 852, S. 898, S. 1036, S. 1216, S. 1509, S. 1646, S. 1712, S. 2040 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judici-*

III, or IV, are either deemed to be frivolous appeals, and dismissed without notice,[80] or are decided after oral argument.[81]

In Mississippi, the use of "screening" to determine whether oral argument should be heard could very well be an effective tool for an appellate court in making the appeals system more efficient. Those appeals which are obviously frivolous would be denied the privilege of oral argument.[82] Those cases which are of serious consequence would be given a full hearing. In the remainder of cases, where the oral argument is limited, the advocate would be forced to organize his arguments, and to limit them only to the major points of interest to the court. The result would be to shift the priorities of the court to the more important issues, thus increasing the efficiency of the court without sacrificing the quality of justice.

D. *Law Clerks*

Members of a court may make more efficient use of their time through the employment of judicial research assistants, better known as law clerks.[83] Though there has been some resistance in the past to the use of law clerks,[84] it is generally accepted today that they ". . . are rightly regarded as virtually indispensible to [the appellate courts'] functioning."[85]

Law clerks are required to be graduates from accredited law schools and usually must rank in the upper portion of their graduating class.[86]

---

ary, 91st Cong., 1st Sess., at 255 (1969). However, Judge Brown also advises that no cases are screened out without oral argument unless there is unanimous consent of the judges. *Id.* at 254.

[80] Class I cases are deemed to be frivolous. **FIFTH CIRCUIT** R. 20. However, to the Fifth Circuit's surprise, after the first 6 months of operation under the new rule, only two "frivolous" cases were found. *Hearings on Improvements, supra* note 79, at 225.

[81] Class III cases are put on the regular calendar for oral arguments, but arguments are limited to 15 minutes for each side. Class IV cases are given unlimited argument up to 30 minutes, as authorized by **FED. R. CIV. P.** 34. *Id.* Also during the first 6 months of operation of Rule 18, 168 cases were labeled as Class III, as compared to 143 Class IV cases. *Id.* at 255.

[82] As in other states, there is probably no right to oral arguments on appeal in Mississippi. *See, e.g.*, Burrell v. Kaiser Aluminum & Chem. Co., 408 F.2d 399 (5th Cir. 1969); *cf.* First Carolinas Joint Stock Land Bank v. Stuckey, 170 S.C. 86, 169 S.E. 843 (1933).

[83] Also known as research attorneys, research aides, and personal assistants.

[84] *See* Braden, *The Value of Law Clerks*, 24 **MISS. L.J.** 295 (1953).

[85] Appellate Judges' Conference of the Section of Judicial Administration of the American Bar Association, Appellate Court Opinions 32 (Aug. 7, 1966), *citing* **ABA COMM. REPORT ON INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS** 43. *See also* Stuart, *supra* note 69, at 607; Comment, *Alabama Appellate Court Congestion: Observations and Suggestions from an Empirical Study*, 21 **ALA. L. REV.** 150, 162 (1960).

[86] Comment, *supra* note 85, at 162; **AMERICAN JUDICATURE SOCIETY, LAW CLERKS IN STATE APPELLATE COURTS** 1 (Jan. 1968).

Generally, these positions are short-term, in that the clerk serves for a 1 or 2-year period.[87] Some judges, however, have permanent "career clerk" positions.[88] The law clerk commonly serves as the personal assistant of a particular judge[89] and is charged with a requirement of confidentiality.[90] However, at least one state has benefited from the use of a "clerk pool" of specially selected and trained law clerks who prepare memoranda on each appeal before the court.[91]

It has been advocated that the short-term period of employment of law clerks is a poor practice, in that it wastes the time of the court in retraining new clerks each year. It is argued that when the clerks leave the service of the court ". . . they are taking with them expert skills which the court has developed and can ill afford to lose."[92] However, the arguments for retaining the short-term employment system are substantial. Law clerks, particularly in the federal courts, are usually "first rate" graduates with law review experience (or the equivalent) which has exposed them to the most recent ideas and developments in the law.[93] It has been said that: "Their ability to bring these ideas to the

---

The Mississippi Supreme Court requires its clerks to be graduates from the top 25 percent of their class. The clerks are selected by the court as a whole, and assigned by lot, with the exception of the clerk for the chief justice, who is personally selected by the chief justice. **Council of State Governments**, *supra* note 34, at 80-83, table XIV. Some federal judges require their clerks to be top graduates, as well as have law review experience. Letter from Chief Judge William Keady, United States District Court, Northern District of Mississippi, to David Watkins, May 8, 1973.

[87] Appellate Judges' Conference, *supra* note 85, at 32; **American Judicature Society**, *supra* note 86, at 2; **Council on State Governments**, *supra* note 34, at 80.

[88] In California about one-half of the research attorneys (law clerks) are career employees. **Council on State Governments**, *supra* note 34, at 82 n.d. Quite a number of states do not expressly fix the term of office, though apparently, by custom, it is generally set at 1 or 2 years. **American Judicature Society**, *supra* note 86, at 3-10. At least 21 jurisdictions seemingly require annual replacement of law clerks. **Council on State Governments**, *supra* note 34, Table XIV.

[89] Appellate Judges' Conference, *supra* note 85, at 34-35.

[90] *E.g.*, **Miss. Code Ann.** § 9-3-27 (1972), provides that law clerks and secretaries ". . . will not disclose the secrets or deliberations of the court . . . ."

[91] Leinski, *Judicial Research Assistants: The Michigan Experience*, 10 **Judges'** J. 54 (1971).

[92] Appellate Judges' Conference, *supra* note 85, at 32.

[93] Dorsen, *Law Clerks in Appellate Courts in the United States*, 26 **Modern** L. **Rev.** 265 (1963); *see* Braden, *The Value of Law Clerks*, 24 **Miss.** L.J. 295 (1953).

Of course, the ability of the state courts to attract and retain these "first-rate" graduates depends upon the opportunity afforded by the clerking experience and the financial remuneration received.

In Mississippi, the supreme court has had the unfortunate experience in the past of losing some of the "better" qualified graduates to the federal system. Interview with Chief Justice Gillespie, *supra* note 24. One reason is probably the salary differential: $750 per month for the Mississippi Court, *id.*, as opposed to $1,100 to $1,200 per month in the federal courts. *See* 5 U.S.C. § 5332 (Supp. 1973); 28 U.S.C.A. § 604(a) (5) note.

attention of their judges . . . enhances the intellectual integrity of the judicial process . . . by keeping it responsive to developing legal thought."[94] If a change to a permanent, "career" position is instigated, the attraction of the "first-rate" graduates may cease, since many are willing to clerk only for a temporary period. The eagerness, and even the naiveté, of these young graduates are valuable assets in making the short-term appointment preferable.

> The law clerk, fresh with all too many ideas of what is wrong with the law and what ought to be changed, is the perfect antidote to the tired judge who has heard all the arguments many times before. Together law clerk and judge can temper the ancient rules with advanced ideas coming out of the law schools.[95]

The duties performed by law clerks vary from judge to judge and from court to court. Initially, a clerk provides a valuable sounding board to the judge. However, the main duty, of course, is doing research. This research usually takes the form of examining and digesting records, briefs, and petitions; inspecting citations; preparing memoranda; and editing opinions.[96] However, in some cases the clerk may participate in every phase of the judge's work, including the drafting of opinions.[97] Considerable leeway should be given to the individual justice to utilize the talents of his clerks as he sees fit. "It should be remembered . . . that it is the task and not the authority which may be delegated. The clerk can prepare a draft of the opinion, but the judge must make it, by adaptation or adoption, his own opinion."[98] Thus, even if the judge does use his clerk to the extent of drafting opinions, it may be argued that it is no less the product of the judge than if he had drafted it himself.[99]

---

[94] Dorsen, *supra* note 93, at 270.

[95] Braden, *supra* note 93, at 297.

[96] Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 ORE. L. REV. 299, 314 (1961); *see* Appellate Judges' Conference, *supra* note 85, at 33; Braden, *supra* note 93, at 296-98; Dorsen, *supra* note 93, at 267-69.

In Mississippi, the duties are limited to research, preparation of various memoranda, inspecting citations, and editing first drafts of opinions. "The research assistant does not participate in the decision making process." Address by Chief Justice Gillespie, *supra* note 56.

[97] The idea that law clerks might be "making law" at the United States Supreme Court level touched off an unpleasant controversy in 1957. Various news media reports referred to clerks as "ghost writers" and "workers . . . not subject to the usual security or loyalty checks . . ." that exerted too much influence on judges. *Bright Young Men Behind the Bench,* U.S. NEWS & WORLD REPORT, July 12, 1957, at 45-48. An appropriate response was given by constitutional (and conservative) scholar Alexander Bickel, a former clerk to Justice Frankfurter. Bickel, *The Court: An Indictment Analyzed,* N.Y. Times, April 27, 1958 (Magazine), at 16.

[98] Appellate Judges' Conference, *supra* note 85, at 34.

[99] *See* Rehnquist, *Who Writes Decisions of the Supreme Court*, U.S. NEWS & WORLD

The judge still must ultimately answer for the work which has his name on it.

In Mississippi, the supreme court is empowered to employ as many law clerks as it deems necessary and at a salary fixed by the judges.[100] The court currently employs one clerk per judge. The court has indicated its satisfaction with the use of clerks and intends to continue their use.[101]

E. Reduction in the Size of Records and Briefs

A very time-consuming function of the appellate court judge is the reading and assimilating of transcripts and briefs.[102] This is a slow and painstaking process, and much of the effort of the judiciary is often exhausted in plowing through matters of no material value to the appeal.[103] One way to ease this problem is to require an "abstract of record" to be included with the brief, along with the other original papers. The Mississippi Supreme Court has adopted a rule which requires an abstract of the record whenever the transcript exceeds 500 pages.[104] This does not replace the record, but merely assists the individual judge in developing an understanding of the case. The transcript is available for any clarification of ambiguities.

Another approach to the problem is the use of the so-called "appendix method."[105] Under this method, relevant portions of the record are appended to the briefs for instant reference by the reviewing judge. Thus, the judge is relieved of the burden of reading the entire record. The procedure serves to shift the burden of examining the record for relevant material from the judge to the lawyer, where it should be under our adversary system of jurisprudence. However, this shift probably does not present an additional burden to the lawyer, since he must sift

---

REPORT, Dec. 13, 1957, at 74-75.

[100] MISS. CODE ANN. § 9-3-27 (1972). The flexibility of this statute is extremely important. It is imperative that the court be allowed to expand or reduce the size and salary of its law clerk staff as the situation demands.

[101] Interview with Chief Justice Gillespie, *supra* note 24.

[102] *Id.*

[103] *See* Stuart, *supra* note 69, at 608.

[104] MISS. SUP. CT. R. 41.

[105] *See* Breen, *Solutions For Appellate Court Congestion,* 47 J. AM. JUD. SOC'Y 228, 232 (1964); Stuart, *supra* note 69, at 608.

A substantial number of states already utilize this process. When the state of Wisconsin adopted the appendix method in 1942, it was reported that, in the first year, it resulted in a 32.8 percent decrease in printed material before the court. *Id.*

See also FED. R. APP. P. 30(a), which provides in part that: "The appellant shall prepare and file an appendix to the briefs which shall contain . . . any . . . parts of the record to which the parties wish to direct the particular attention of the court . . . ."

through the record in order to prepare his brief. In a similar manner, the court is protected by the adversary nature of our legal system from the use of appendices so brief that an inadequate image of the record is reflected.[106]

Reasonable restraints on the length and form of briefs are a common practice in many states.[107] Under Rule 7(c) of the Mississippi Supreme Court Rules, the length of briefs are limited to a maximum of 50 pages, exclusive of any abstracts of records. This is also the limit imposed by the federal courts.[108]

There may be some cases with issues so complex that the limitation to a 50-page brief may appear to be insufficient to adequately explain the advocate's position. However, it is doubtful that the extra pages would achieve the desired result since the quality of the brief would more likely be enhanced by condensation to a size and form more readily digestible to the appellate judge.

F. Opinions

> The function of an appellate opinion is to state the reasons which led the court to decide the case the way it did. Such a statement of reasons has value from the standpoint of the judges, litigants, and the legal profession in general.[109]

The writing of judicial opinions is one of the most time-consuming functions of an appellate court.[110] As a result, there has been a growing concern about the vast number and length of cases being written and published today.[111] Although a "full-dress" written opinion is often required, many cases may be disposed of with a shorter opinion.[112] By utilizing shorter opinions, the court will be able to save time for its other judicial functions.[113] Furthermore, by reducing the quantity and the length of opinions written, the judges could more easily concentrate on improving the quality of its opinions.[114]

---

[106] *See* FED. R. APP. P. 30(b); *cf.* MISS. SUP. CT. R. 41(b).

[107] *See, e.g.*, CALIF. R. OF CT., tit. I, div. I, R. 15; FLA. APP. R. 3.7.

[108] FED. R. APP. P. 28(g).

[109] ABA COMM. REPORT ON INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS, *supra* note 85, at 19.

[110] *See* Stuart, *supra* note 69, at 609.

[111] *See* A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 443 (1949); Stuart, *supra* note 69, at 609; *cf.* Gregory, *Shorter Judicial Opinions*, 34 VA. L. REV. 362 (1948).

[112] These would include cases involving settled principles of law, procedural questions, disciplinary proceedings, and cases which should not have been brought to the reviewing court. Breen, *supra* note 105, at 231.

[113] Nevertheless, the decision reached should be the result of careful analysis, regardless of whether a full opinion or a shorter opinion is written. Stuart, *supra* note 69, at 611.

There are several different types of short-opinion forms which may be utilized by an appellate court. Of course, a full opinion gives a thorough analysis of the facts, the law, and the reasoning of the court in each case. A memorandum opinion[115] is a shorter opinion which deals with only select aspects of a case or disposes of the case without mentioning the facts or the law. Finally, a summary affirmance is not really an opinion produced by the court, but rather an adoption of the decision and opinion of the lower court, an oral pronouncement, or sometimes a brief "per curiam" opinion.[116]

The Mississippi Supreme Court has recently made efforts to ease the workload and improve the body of case law by increasing the use of "per curiam" opinions to dispose of cases.[117] The enactment of a statute which only requires written opinions in certain cases indicates that the legislature concurs with this philosophy.[118]

G. *Miscellaneous*

Many other ideas under the general heading of "judicial reform" can help to increase the efficiency of an appellate court. One is the use of a merit selection plan for the appointment of judges.[119] Although a variety of plans has been used in several states, the most acclaimed system is the "Missouri Plan."[120] After 30 years under the Missouri Plan, the results have been significant. Most lawyers and judges agree that the plan has produced better judges than the popular-election system.[121]

---

[114] Without a doubt, this would also be beneficial to the practitioner, in terms of research, analysis, and predictability.

Another method of relieving the "opinion explosion" would be for the court to publish only selected opinions and not to permit use of the other opinions as authority in subsequent cases.

[115] Memorandum opinions are usually rendered in the form of "per curiam" opinions of the court.

[116] Although the court calls these opinions "per curiam" opinions, they are generally labeled in other states as "summary affirmances without opinions." *See* Stuart, *supra* note 69, at 612.

[117] *See* text accompanying note 18 *supra*.

[118] Miss. Code Ann. § 9-3-41 (1972), provides:

> In all cases settling important principles, in cases to be remanded, and in all cases where the judgment or decree of the court below is reversed, and in all felonies where the punishment prescribed is ten years or more, the opinion of the Supreme Court shall be in writing stating the reasons upon which the decision is made . . . .

See Duncan v. Perkins, 192 So. 2d 386 (Miss. 1966).

[119] Some of the attributes which are considered under a "merit" selection system include: moral courage; decisiveness; reputation for fairness and uprightness; patience; good health, both physical and mental; consideration for others; less than 60 years of age; sense of humor; and above average reputation for professional ability. Rosenberg, *The Qualities of Justices—Are They Strainable?*, 44 Texas L. Rev. 1063, 1066-67 (1966).

"In the long run, 'There is no guarantee of justice except the personality of the judge.' " Ehrlich, *Freedom of Decision*, 9 Modern Legal Philosophy Series 65 (1917) *cited in* Rosenberg, *supra*, at 1063.

At the present time Mississippi has no such plan. Instead selection is through the electoral process.[122] However, there have been some movements to implement judicial selection and tenure procedures on the basis of merit.[123]

Another area of increasing interest to the bar, as well as the judiciary, is the use of computers and electronics in the practice and administration of law.[124] Computers can be vastly effective not only as a time saving device, but also in producing a more accurate and comprehensive work product.[125] Apparently, the problem which is plaguing the use of these devices is the enormous capital outlay required for any computer system and the reluctance of the bench and bar to accept such "newfangled" notions.[126] However, the future is bright, and experts in the field predict that within 10 years it will be common for almost every law firm to be using computers in one form or another to help solve legal problems.[127]

---

[120] The theory behind the plan is that a judicial nominating committee, usually an adjunct of the bar association, selects a slate of highly competent attorneys possessing judicial qualifications. This list is presented to the Governor of the state to select the single nominee (or judge) to fill the vacancy. The nomination is then subject to confirmation by the upper house of the legislature. Upon confirmation the judge is given a commission for 6 or 8 years, and thereafter runs only against his own record; no opponents are listed on the ballot. The election is simply in the form of "approve" or "disapprove." If the judge is rejected, then a new judge is selected to fill the vacancy, using the judicial-selection machinery again. The authority for the plan is vested by the State's constitution. MO. CONST. art. 5, § 29.

[121] Watson, *Missouri Lawyers Evaluate the Merit Plan for Selection and Tenure of Judges*, 52 A.B.A.J. 539 (1966). *See also* Hearnes, *Twenty Five Years Under the Missouri Court Plan,* 49 J. AM. JUD. SOC'Y 100 (1965); Hunter, *A Missouri Judge Views Judicial Selection and Tenure,* 48 J. AM. JUD. SOC'Y 126 (1964).

[122] The qualifications required of judges at the present time relate to age, residency, and minimum years of practice as a lawyer. MISS. CONST. art. 6, §§ 150, 154.

[123] *See* MISS. JUD. COMM'N REPORT 12, proposing the creation of a "judicial qualification commission."

Although there is no official provision in Mississippi for a merit-basis selection of judges, it has been indicated that Governor William L. Waller favors such a plan. He is presently awaiting the outcome of a Bar Association study before deciding what type of merit basis to adopt. Letter from James E. Williams, Administrative Assistant to Governor William L. Waller, to David Watkins, October 11, 1973.

[124] *See generally* ABA STANDING COMM. ON LAW AND TECHNOLOGY, COMPUTERS AND THE LAW (2d ed. 1969); THE LAW OF COMPUTERS (G. Holmes & C. Norville ed. 1971).

[125] Columbia University School of Law, Seminar on "Computers, Society, and the Law," August 8, 1972; Interview with J. William Mullen, Director of Education and Software Planning, Mississippi Central Data Processing Authority, in Jackson, Mississippi, June 28, 1973.

There are unlimited uses of computers and electronics in relieving the workload of judges and practicing attorneys. These include: computerized legal research, computer transcription, videotaping of trials (trialvision), videotaping of depositions (depovisions), tape recorded trials and oral arguments, dictating equipment, copiers, other office machines, and the use of photocomposition techniques for the printing of opinions, briefs, etc. Untitled Committee Report, on file at the MISS. LAW JOURNAL.

III. REDUCTION OF THE WORKLOAD PER JUSTICE

Another possible solution to the Mississippi Supreme Court's case-overload problem is to reduce the number of cases handled by each justice. This can be accomplished by: (1) increasing the number of justices on the court; (2) hearing cases in panels; (3) using court commissioners; and (4) taking legislative action to reduce the number of cases eligible for appeal to the supreme court.[128] All methods have numerous disadvantages, but each may be used with modifications.

A. Increase in the Size of the Court

The addition of one or more judges to the court is frequently suggested by court reformers as a method by which to reduce the number of opinions per justice.[129] This method obviously has the desired effect

---

Computer transcription of trial records is currently receiving growing attention. With the use of a special "stenotype" machine, a magnetic tape cartridge is created along with the usual paper tape. This cartridge is then fed into a computer (probably through telephone lines) and translated and printed almost instantaneously. Recently, Chief Justice Gillespie called for consideration of the use of electronics in various court procedures. Address by Chief Justice Gillespie, *supra* note 56.

Another important use of computers, and perhaps the most far-reaching one, is in the area of legal research. With the aid of the computer, lawyers and judges will not only be able to do legal research in a mere fraction of the time otherwise required, but will also be able to produce a more accurate and more complete work product. *See generally* ABA STANDING COMM. ON LAW AND TECHNOLOGY, AUTOMATED LAW RESEARCH (1973). The Mississippi Central Data Processing Authority is running a pilot computer research program under the IBM STAIRS system. The data base, at the present time, consists of the Mississippi Code of 1972, though plans are being made for possible inclusion of the attorney general's opinions, administrative agency regulations, and Mississippi Supreme Court decisions. Interview with J. William Mullen, *supra*.

[126] Interview with A.F. Summer, Attorney General of the State of Mississippi, in Jackson, Mississippi, June 28, 1973.

[127] Interview with J. William Mullen, *supra* note 125.

[128] *See generally* Breen, *supra* note 105, at 228; Stuart, *supra* note 69, at 594.

[129] The policy of adding judges has been followed in federal courts for the last two decades. The Judgeship Acts of 1961 and 1966 alone have added a total of 93 additional circuit judgeships. In the last 12 years there has also been an addition of 29 appellate judges; however, this has not prevented the federal courts from being overburdened by congestion; during the same 6-year period the number of cases commenced in the court

of decreasing the number of opinions each judge must write, but it is accomplished at a sacrifice of judicial efficiency.[130] Mississippi now has nine justices[131]—no state has more than this.[132] It is felt by many that nine is the maximum number, for each justice must still review the record, ask questions of counsel during oral argument, and review opinions written by fellow judges; therefore, any further additions to the court would result in an increase in the time required to decide the case rather than a swifter disposal of the case.[133] Chief Justice Gillespie of the Mississippi Supreme Court has expressed opposition to any additional judges for similar reasons of judicial inefficiency,[134] and a recent survey of state supreme court judges indicated that over 60 percent of those responding were strongly opposed to this type of reform.[135]

However, Professor Charles Alan Wright of the Texas Law School points out that two decades ago legal scholars doubted the effectiveness of any court consisting of more than six judges. He also suggests that the fear of an inefficient court resulting from more than nine members is "more in the fashion of de Tocqueville's admonition of confusing the familiar with the necessary."[136] Wright also states that there are many courts elsewhere that function with up to 36 judges and the Tax Court of the United States consists of 16 judges.[137] Indeed, Mississippi's nine-judge court is merely an extension of what was once a three-judge court, and it is doubtful if its first justices would have advocated or even considered feasible the present nine-justice court. Another factor which should be considered is the cost of additional judges. Next to the estab-

---

of appeals rose from 3,899 to 6,548. *See* Carrington, *Crowded Dockets and the Court of Appeals*, 82 HARV. L. REV. 542, 544 (1969); 28 U.S.C. § 44 (1970). *See generally* Shafroth, *Survey of the United States Court of Appeals*, 42 F.R.D. 243 (1968). Both of the above articles infer that the addition of more judges to the federal system would be counterbalanced by the inefficiency brought about by the sheer size of the court. *See also* Winters, *New Approaches to Appellate Court Problems*, 18 LA. B.J. 29, 30 (1970).

[130] Dethmers, *Delay in State Appellate Courts of Last Resort*, 328 ANNALS 153, 158 (1960). *See also* AMERICAN JUDICATURE SOCIETY, CONGESTION AND DELAY IN THE STATE APPELLATE COURTS 8, 9 (Report No. 25, June 1969); Stuart, *supra* note 69, at 597 n.15.

[131] MISS. CONST. art. 6, § 145 B.

[132] *See* COUNCIL OF STATE GOVERNMENTS, *supra* note 34, table I.

[133] *See* Dethmers, *supra* note 130, at 158.

[134] Interview with Chief Justice Gillespie, *supra* note 24.

[135] CONGESTION AND DELAY, *supra* note 130, at 9.

[136] *See* Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEXAS L. REV. 949, 971 (1964).

[137] *Id.* Although there have been no other courts in the United States consisting of more than nine judges, the trial courts of England have up to 36 judges and are still functioning. However, the English Court of Appeals presently consists of only 12 judges divided into three-judge panels. It is impossible to draw a valid comparison between the number of judges in each court due to the extreme differences in appellate procedure and structure. *See id.* at 971.

lishment of an intermediate appellate court, the addition of a judge is perhaps the most expensive available method of reducing the court's workload, for it requires additional expenditures for salary and facilities to accommodate each new justice.[138]

B. Panels or Divisions

The most direct manner of improving the efficiency of the supreme court would be to reduce the number of judges presently sitting in divisions from five to three, thereby establishing three separate divisions rather than two.[139] As early as 1941 legal scholars were advocating a three-judge appellate court as offering the most efficient method of disposing of cases.[140] It is contended that: "[T]hree judges will come nearer getting to the heart of a case by the intimate sort of conference that three men will have than will a court of seven [or more] with the more formal conference that necessarily results from participation of the larger number."[141] The federal circuit courts of appeals currently sit in divisions of three in practically all cases,[142] though the number of circuit judges varies from 3 to 15.[143] There are 19 state supreme courts that have five judges or fewer,[144] thereby having the same effect as a three to five judge panel in Mississippi. The Missouri Supreme Court has sat in two divisions, of four and three judges respectively, since 1891 and the panel system is considered by its justices as absolutely essential.[145] New Mexico has a similar system consisting of five judges who sit in panels of three to decide almost all cases and this plan has reduced the workload of the five justices by 25 percent.[146] There are 14 states, including Mississippi, which sit in divisions under varying restrictions.[147]

---

[138] *See generally* CONGESTION AND DELAY, *supra* note 130.

[139] Under art. 6, § 149 A of the Mississippi Constitution, the supreme court was authorized to sit in two divisions of three judges each. The Mississippi Constitution was not amended to provide for two five-judge panels when in 1952 the number was increased from six to nine. *See* MISS. CONST. art. VI, § 145 B. (1890). However, the court did amend its rules to authorize such a division. *See* MISS. SUP. CT. R. 35 (b) (Dec. 20, 1967). These amendments were followed in the decisions of Hays Finance Co., Inc. v. Bailey, 56 So. 2d 806 (Miss. 1952) (which held that a decision by any division of the court was a final decision of the court), and Carney v. Anderson, 214 Miss. 504, 59 So. 2d 262, *cert. denied,* 344 U.S. 860 (1952) (which held that the decisions of the five-judge panel were final).

In the *Carney* case the court further stated that:

> Since the adoption of . . . [MISS. CONST. art. VI § 145 A] we do not consider any cases in banc [*sic*] except in the event there is a disagreement among the five who originally heard the case and except in cases where a death sentence has been imposed and except in cases where we are confronted with overriding a prior decision and except in those cases which are considered by the panel of five judges to be of such importance that a consideration in banc [*sic*] is deemed advisable.

Id. at 504, 59 So. 2d at 262.

[140] R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 384 (1941).

[141] Parker, *Improving Appellate Methods,* 25 N.Y.U.L. REV. 1, 9 (1950).

[142] It seems that most Fifth Circuit Judges favor the substitution of one-judge for the three-judge panel in order to further speed up the disposition of cases. The Clarion Ledger (Jackson, Miss.), Aug. 24, 1973, § A, at 1, col. 5, 6, & § A, at 10, col. 6.

[143] ABA COMM. ON JUDICIAL ADMINISTRATION 57 (1961); 28 U.S.C. § 44 (1970). *See also* Wright, *supra* note 136, at 970.

[144] COUNCIL OF STATE GOVERNMENTS, *supra* note 34.

The Mississippi Supreme Court currently sits in panels of five to determine all but a few cases.[148] The court is divided more or less arbitrarily, with all but one justice hearing cases every other week.[149] However, Chief Justice Gillespie feels that, although impossible under the present caseload, it would be better if the court did not sit in panels, thereby allowing each justice to hear each case.[150]

There are others who have criticized this system because different panels give different results,[151] and this could lead to the unscrupulous assignment of particular judges to particular cases in order to reach a desired decision.[152] Other criticisms are that: (1) the panel system tends to increase the number of matters heard by the court because the en banc hearings are always subsequent to a prior hearing by one of the divisions; and (2) the system results in two or more supreme courts instead of one, especially if the division assignments are permanent rather than rotating.[153] Perhaps the greatest criticism of the panel system is that: "It seems more in keeping with American Tradition and thinking that the matters presented to courts of last resort, any of transcendent importance to people, call for the composite judgment of more than a division of such courts."[154] However, a countervailing attitude is voiced by the Missouri Supreme Court:

---

[145] *The Work of the Missouri Supreme Court for the Year 1938,* 4 MO. L. REV. 345, 346 (1939). In Missouri, three judges hear all criminal cases while the other four try only civil actions. *Id.*

[146] If one of the participating judges disagrees with the decision, then the case will be heard before all five judges, and at all times two judges must concur with the opinion as written. For a case analysis of the New Mexico "Three Judge Court" see Comment, *Courts—Number of Justices Concurring in Opinion—Some Dangers of New Mexico's "Three Judge Court,"* 5 NATURAL RESOURCES J. 403 (1965).

[147] These states are Arkansas, California, Colorado, Florida, Iowa, Indiana, Kentucky, Mississippi, Missouri, Nebraska, New Mexico, Tennessee, Virginia, and Washington. *See* Stuart, *supra* note 69, at 598 n.18.

[148] *See* Interview with Chief Justice Gillespie, *supra* note 24.

[149] *Id.* The American Bar Foundation suggests that divisions be made along subject matter lines, and the court may do well to consider this alternative if the caseload becomes insurmountable and no other relief is in sight. *See* CONGESTION AND DELAY, *supra* note 130. However, this division tends to lead to specialization of each panel and thereby strengthens the argument that divisions lead to two or more supreme courts.

[150] *See* Interview with Chief Justice Gillespie, *supra* note 24.

[151] *See* Lincoln Nat'l Life Ins. Co. v. Roosth, 306 F.2d 110 (5th Cir. 1962).

[152] This charge was voiced by Judge Cameron in his dissent from denial of petition for en banc rehearing in Armstrong v. Board of Educ., 323 F.2d 333, 352-59 (5th Cir. 1963). Judge Cameron stated that "[t]he idea that the Chief Judge may thus gerrymander the United States Judges of a State in order to accomplish a desired result is, I think, entirely foreign to any just concept of the proper functioning of the judicial process." *Id.* at 359. *But see* Breen, *supra* note 105, at 230, which states that "almost half a century's experience with the divisional system in Missouri tends to show that inconsistent opinions from different divisions have never been a serious problem." *See* Dethmers, *supra* note 130, at 159.

> Surely one of the most important accomplishments of any appellate system, both for the benefit of the legal profession and in the public interest, is to solve the problem of getting its dockets up to date and keeping them on a current basis so that cases will be finally determined without undue delay. Missouri experience with the divisional system shows it can be a valuable aid to such accomplishment. . . .[155]

It must also be noted that the Mississippi Supreme Court feels it could not handle its present workload without the use of its present five-man divisions.[156] It is submitted that if their workload becomes greater and there are no other remedies forthcoming, the court may do well to use its discretionary power to reorganize itself into three divisions of three judges each.[157]

C. Court Commissioners

The workload of the individual justices could also be reduced through the use of court commissioners. By 1970, the legislatures of 10 states had authorized the use of court commissioners to assist the justices.[158] The commissioners are either appointed by the court or are made commissioners upon their retirement from active duty as a judge on the supreme court.[159] They are all attorneys, and in some states must have the same qualifications as a judge.[160] In most of these states the duties of the commissioner are determined by the court; they may range from acting as law clerks, to hearing oral arguments and preparing opinions for approval by the court, to actually disposing of cases assigned them by the court.[161] Their terms are either set by statute or subject to the discretion of the court,[162] and their salaries vary from $14,000 to $20,000 in Indiana, to as much as $26,700 in Michigan.[163]

---

[153] *See* Dethmers, *supra* note 130, at 159.

[154] *Id.*

[155] *See The Work of the Missouri Supreme Court for the Year 1938, supra* note 145, at 350.

[156] *See* Interview with Chief Justice Gillespie, *supra* note 24.

[157] A recent Alabama proposal recommends that its supreme court consist of 13 judges to be divided into specialized panels of 3 judges each, with the chief justice's function being primarily administrative. *See Alabama Appellate Court Congestion: Observations and Suggestions from an Empirical Study,* 21 ALA. L. REV. 150, 165 (1968).

[158] The states actually using court commissioners as of 1970 are: Indiana (one commissioner); Kansas (two commissioners); Kentucky (four commissioners); Michigan (two commissioners); Minnesota (one commissioner); Missouri (six commissioners); Ohio (three commissioners); and South Dakota (one commissioner). Minnesota, North Dakota and South Dakota had no limit on the number of commissioners authorized but required that they must have retired as a justice of the supreme court. Louisiana also appoints commissioners in certain instances, such as proceedings to disbar lawyers or remove judges. *See* COUNCIL OF STATE GOVERNMENTS, *supra* note 34, at 76, 77. *See also* Breen, *supra* note 105, at 230.

The court commissioner has been an effective tool for prevention of case overload in some states. In 1911, when the Missouri Supreme Court first made use of a court commissioner, the average time between docketing and submission of cases appealed from circuit court was 3 years and 2 months with an additional 3-month delay for the writing of the opinion. Eight years later this delay has been reduced by 1 year, the reduction being attributed solely to the commissioners.[164]

In 1973, Mississippi passed legislation which allows a retired member of the Mississippi Supreme Court to become a supernumerary justice.[165] Under this act the supernumerary judge will be allowed to partic-

---

[159] *See* COUNCIL OF STATE GOVERNMENTS, *supra* note 34, at 76,77; Breen, *supra* note 105, at 231.

[160] Breen, *supra* note 105, at 231.

[161] In Indiana the court commissioner handles the administration of the cases and the processing of original actions, while in Ohio the decision of the commissioners is considered final. The Ohio commissioners hear motions for leave to appeal in non-capital criminal cases and all civil cases, as well as motions to certify misdemeanor cases, and habeas corpus cases. Only in Ohio and Minnesota are the commissioners allowed to cast a vote on the disposition of the case, in effect making them supreme court justices. *See* COUNCIL OF STATE GOVERNMENTS, *supra* note 34, at 76, 77; Breen, *supra* note 105, at 231.

[162] *See* COUNCIL OF STATE GOVERNMENTS, *supra* note 34, at 76, 77.

[163] *Id.*

[164] REPORT OF SPECIAL COMMITTEE APPOINTED TO INVESTIGATE THE STATUS OF THE SUPREME COURT DOCKET TO FIFTIETH GENERAL ASSEMBLY, Vol. III, HOUSE & SENATE J., Appendix (1919) *cited in* Yendes, *A Proposed Plan for Commissioners for the United States Supreme Court*, 25 U. KAN. C.L. REV. 178, 192 (1957).

[165] S. B. No. 1934, (1973). Miss. Gen. Laws ch. 452 (1973) which states in part:

> Any Judge of the Mississippi Supreme Court who has reached the age of sixty-eight (68) years, and is not older than seventy-two (72) years, and who resigns as hereafter provided, on or before his seventy-second birthday, may retire from active service as chief, presiding, or associate justice of the Supreme Court by forwarding a written resignation to the Governor, with a copy to the Supreme Court. Any vacancy on the Supreme Court shall be filled as provided by law. Such judge shall perform for the Judges of the Supreme Court such service as the court may designate from time to time. There shall be no more than three (3) such judges serving at any one (1) time and each judge shall serve for a term equal to the balance of the term for which he was last elected by popular vote as a Supreme Court Judge; provided, however, no such judge shall serve for a longer period than four (4) years. Such judge shall receive a salary equivalent

ipate in oral argument, ask questions from the bench, and perform all other functions of a supreme court justice except vote on the decisions.[166] However, though Mississippi now has such a statute authorizing a supernumerary or court commissioner, it still does not have such persons who fulfill this role and so its effect upon the case overload is questionable.[167] Under the Mississippi system, the caseload problem will continue to worsen, while the existence of one or more court commissioners or supernumeraries will vary according to the availability of retired supreme court justices. It could be possible that the supernumerary position will not be filled when it is needed most, and therefore, it is difficult to consider the present system of commissioners (or supernumeraries) in Mississippi a permanent solution to the problem of case overload.[168] However, a temporary solution is better than none at all. It is possible that the supreme court may, through the experience of using a supernu-

---

> to two-thirds (2/3) of the salary of an associate justice. . . . But such judge shall not be entitled to vote as to the decision of any case heard by the Supreme Court.

[166] *See* Interview with Chief Justice Gillespie, *supra* note 24. Telephone conversation of David H. Baker with Mr. Fortenberry of the office of the Secretary of the Senate on June 1, 1973, concerning S. B. No. 1934. Those objections to the use of court commissioners on the grounds that all decisions should be made by qualified judges are obviously without merit when retired judges are acting as commissioners. However, the commissioners are still not elected by the people.

[167] Chief Justice Gillespie states that, with the supernumerary judge, Mississippi does not need a provision for a permanent court commissioner. *See* Interview with Chief Justice Gillespie, *supra* note 24. Justice Robertson, however, feels that the use of supernumerary justices will be of little, if any, value to solving the problems of the court. Interview with Justice Stokes Robertson, of Mississippi Supreme Court, in Jackson, Mississippi, June 28, 1973.

[168] In 1910 Mississippi initiated the court commissioner system, authorizing two commissioners who were appointed by the Governor for terms of 9 and 6 years respectively. They were paid the same salary as the justices ($4,500). *See* Act of April 1, 1910, ch. 1, § 1, [1910] Miss. Gen. Laws 3. Their duties were as follows:

> [T]o aid and assist the said court in the performance of its duties, and in the disposition of the causes now pending in the said court undetermined and in the determination of such causes as may be presented to the said court for determination.

Act of March 16, 1910, ch. 164, § 1, [1910] Miss. Gen. Laws 158 (repealed 1912). Though the above statute could be construed to give the commissioners authority to vote on a case, it is thought that they only heard cases and wrote opinions which were then adopted by a per curiam statement of the judges. *See* Guest v. State, 96 Miss. 871, 881, 52 So. 211, 213 (1910). The first commissioner appointed was former Chief Justice Whitfield, who resigned from the court to accept the job of commissioner. *See* note to table of Officers of the Supreme Court 95 Miss. iii (1910). Apparently the commissioner system was unsatisfactory, for the statute was repealed in 1912, long before the terms of the commissioners would have expired. See Act of July 1, 1912, ch. 259, [1912] Miss. Gen. Laws 327. *See generally* **Organization of the Courts**, *supra* note 28, at 212 (1940).

merary, determine that a full-time, permanent court commissioner would be an effective method of alleviating its case overload problem.[169]

D. Limitations on the Right to Appeal

Another method to solve the problem of overwork and congestion is the restriction of the right to appeal, resulting in the reduction of the number of cases coming before the court.[170] This restriction could be accompanied by a writ of review by which the appellate court may hear some cases at its discretion while certain other cases may, by statute, never be granted appeal.[171] It is realized, however, that the "right to appeal is deeply rooted in our legal system and in our concepts of justice."[172] Therefore elimination of the right of appeal can only be proper either when the amount of judgment is so insignificant as not to merit the costs of additional adjudication or when there is at least one opportunity for appeal prior to a hearing before the supreme court.[173]

---

[169] Although 10 states do use court commissioners, their systems offer only temporary relief, and do not present a solution to the long-range problem of case overload. At best, it can be likened to the addition of judges to the court. If the court commissioners are given too much authority then they function as an extra judge and the court is again presented with additional administrative problems. Moreover, the problems of the litigants would not be decided by a publicly elected official. If the court commissioner is not given enough authority, then he merely acts as another law clerk. Obviously, to be most effective, a balance must be struck between the two extremes. *See* Stuart, *supra* note 69, at 600. Probably the use of supernumerary justices will not noticeably affect the workload of the Mississippi Supreme Court. *See* THE MISSISSIPPI LAW RESEARCH INSTITUTE, A MEMORANDUM ON PROPOSED METHODS OF REDUCING THE WORKLOAD OF THE MISSISSIPPI SUPREME COURT (1973). Presently Mississippi has no retired supreme court justice.

A logical extension of the Mississippi supernumerary system would be the inclusion of the use of future judges; *i.e.*, those selected by the Governor to replace the next retiring justice, thereby giving the future justice valuable experience and increasing the status of the position of court commissioner. However, the initiation of such a system would grant an inordinate amount of power to the incumbant governor and might require a constitutional amendment.

[170] According to the Mississippi Supreme Court, appeal is not a matter of right but is regulated by statute, and only lies in cases provided by statute. State *ex rel.* Brown v. Poplarville Sawmill Co., 119 Miss. 432, 81 So. 124 (1919). *See also* Lotterhos, *Practice and Procedure on Appeals in the Supreme Court of Mississippi*, 30 MISS. L.J. 470 (1959).

[171] *See* CONGESTION AND DELAY, *supra* note 130, at 10-12, wherein a survey of supreme court judges in those states not having an intermediate court strongly advocated (63 percent for and 17.7 percent strongly opposed) restrictions on the right to appeal in civil cases.

[172] *See generally* Hood, *The Right of Appeal*, 29 LA. L. REV. 498 (1969); Hopkins, *Small Sparks from a Low Fire: Some Reflections on the Appellate Process*, 38 BROOKLYN L. REV. 551 (1972); Wilson, *Assignments of Error in Appellate Practice*, 9 KAN. L. REV. 165 (1960).

[173] Comment, *supra* note 69, at 553. Some legal scholars even advocate that civil appeals should be abolished except for those cases involving constitutional issues and issues of the primacy of administrative adjudication. *See* Wilner, *Civil Appeals: Are They*

Presently Mississippi has no minimum jurisdictional amount for appeal, except in those cases appealed from the justice of the peace court to the circuit court. In these cases, the amount in controversy must exceed $50 to be appealable to the Mississippi Supreme Court.[174] Kentucky, which has no intermediate appellate court, requires that the amount in controversy be at least $200, and when the judgment is between $200 and $2,500 the court may hear the case at its discretion.[175] In 1962 Iowa raised its jurisdictional amount from $300 to $1,000.[176] The effect of this increase has not yet been ascertained; however, it is generally felt that even a substantial increase will have little effect on state court caseloads.[177] A parallel might be drawn between such an increase in the state jurisdictional amount and the 1958 increase from $3,000 to $10,000 in the minimum federal monetary requirements for diversity and federal-question jurisdiction.[178] The obvious purpose of this increase was to reduce the congestion in the federal courts.[179] However, it had practically no effect on the actual workload of that court.[180]

Another difficulty with increasing the jurisdictional amount for appeals is the detrimental effect such an increase might have on the poor claimant who is suing for smaller amounts.[181] However, some legal scholars disagree, stating that "it may be a boon in saving . . . [the poor claimant] from becoming obligated for heavy appeal expenses in matters which are not worth it."[182]

Perhaps a more attractive method of limiting appeals would be to give the court discretion in hearing certain types of cases, especially

---

Useful in the Administration of Justice?, 56 Geo. L.J. 417, 449 (1968).

[174] Miss. Code Ann. § 11-51-91 (1972). "[A]n insultingly small amount." Mississippi Law Institute, Circuit Court Practice 263 (1966). *See also* Gardner v. Bookout, 200 Miss. 158, 26 So. 2d 343 (1946) (holding that a $55.12 judgment was not appealable to the supreme court for it included interest of $8.20).

[175] *See* Ky. Rev. Stat. Ann. § 21.080 (1963). *See also* Breen, *supra* note 105, at 233.

[176] Iowa R. Civ. P. 333 (". . . unless the trial judge, within thirty days after the judgment or order is entered, certifies that the cause is one in which appeal should be allowed.").

[177] *See* Stuart, *supra* note 69, at 602. No data on the amounts in controversy in Mississippi Supreme Court cases are presently available, so the effect of an increase in the jurisdictional amount for appeal cannot be determined.

[178] *Compare* 28 U.S.C. §§ 1331, 1332 (1970) *with* 28 U.S.C. §§ 1331, 1332 (1956).

[179] *See* C. Wright, Law of Federal Courts § 32 (2d ed. 1970).

[180] *See* Warren, *Address to the American Law Institute*, 25 F.R.D. 213 (1960).

[181] The increase in the costs of appeal obviously results in denial of due process to poor litigants, but such statutes regulating amounts have not as yet been declared unconstitutional. The legislature must strike a balance between the costs of the court's time and the claimant's right to appeal, if indeed the right to appeal is included in the right to due process under the law. *See* Carrington, *supra* note 129, at 160; Wilner, *supra* note 173.

[182] Dethmers, *supra* note 130, at 160.

those which have already been reviewed by a lower court.[183] Such legislation[184] should not restrict a defendant's right of appeal in a criminal case or a person's right of appeal when a statute has been declared unconstitutional by a lower court.[185] Any other restrictions could be made after carefully weighing the policy factors involved in various types of cases against the frequency of appeal.[186] Such restrictions could include criminal misdemeanor cases where only fines have been levied against the defendant,[187] appeals from guilty pleas,[188] and frivolous appeals.[189] Further appeal from certain administrative agencies could also be barred.[190]

---

[183] It is now possible that a civil case involving $50 to $200 or a criminal misdemeanor case can be heard first in the justice of the peace court, then in the county court, then in circuit court, and then can be appealed to the supreme court for "final" adjudication, assuming that a new trial is not ordered — whereby the entire procedure could be repeated. *Compare* **MISS. CODE ANN.** § 11-51-91 (1972) (appeals from justice of the peace), *with* § 9-9-21 (1972) (county court jurisdiction), *with* § 11-51-81 (1972) (appeals to county court), *with* § 11-51-79 (1972) (appeals from county to supreme court from final judgment in circuit court).

[184] Arguably this power could be given either to the judiciary (for it is they who are overburdened with frivolous and inconsequential appeals and who have the expertise to establish limitations) or to the legislature (for it is the people who are concerned about their right to appeal). *See* Kuhns, *Revising a State Judicial Article: Issues for the North Dakota Constitutional Convention,* 48 N.D.L. **REV.** 219 (1972).

[185] Such limitations seem to have worked well in some states. *See* **FLA. CONST.** art. V, § 4 (2); Kuhns, *supra* note 184, at 219, 233. But such limitations sometimes lead to frivolous constitutional claims in order to obtain additional appellate review. *See* Baum, *The Illinois Supreme Court and Direct Appeals in Constitutional Cases: An Analysis of Judicial Method,* 43 **CHI. B. REC.** 421 (1962).

[186] Though there are no data available for amount of judgments appealed to the supreme court, the statistics on types of cases appealed are published yearly by the court. *See* Eighth Annual Report, *supra* note 8, table IV.

[187] These cases are generally brought in a justice of the peace court and would receive at least one appeal to the local county or circuit court before being heard by the supreme court. However, this might result in a tendency of the lower courts to impose fines rather than incarceration in order to further restrict appeal. *See generally* Stuart, *supra* note 69, at 602, 603.

[188] **MISS. CODE ANN.** § 99-35-101 (1972) specifically denies an appeal from a plea of guilty, but petitioner may apply for a writ of error coram nobis in either the circuit or supreme court, and the court may then, at its discretion, hear the case. Any other limitations placed on appeals by statute would have a similar procedure for petitioning the supreme court for a discretionary hearing.

[189] The authors recognize that a substantial treatise could be written on the right to limit frivolous appeals. It is obvious, however, that the indigent defendant in criminal cases or a wealthy claimant with motives other than seeking financial retribution has nothing to lose by appeal. For an analysis of possible methods of screening frivolous appeals *see* Breen, *supra* note 105, at 603, 604; Carrington, *supra* note 129, at 567; **CALIFORNIA JUDICIAL COUNCIL, 1969 REPORT TO THE GOVERNOR AND THE LEGISLATURE** (1969).

[190] The right of every unsuccessful or dissatisfied litigant to at least one appeal is still satisfied by appealing to the circuit court the decision of such administrative agencies as

If the litigant is still dissatisfied after his appeal to the circuit court, he may petition for a writ of certiorari and the supreme court may hear the case at its discretion.[191]

In spite of its benefits, the limiting of appeals through the use of writs of review still subjects the court to a multitude of petitions which the court must read and discuss in order to reach decisions on which cases merit review. Quite possibly the only time saved is that which would have been spent hearing oral arguments[192] and preparing a written opinion on the decision.[193] Such a saving of time must still be balanced against the:

> American concept of justice and due process, namely that every person is equally entitled not only to a fair trial in the lower court, but also, because every judge can and does make mistakes, to at least one appeal, as of right, to another court for the purpose of securing correction of those mistakes.[194]

Another method of reducing the number of appeals is to make the cost of appeal more expensive.[195] This could be done by: (1) increasing the filing fee[196] or the costs of transcribing records for a supreme court appeal; (2) assessing true court costs, rather than nominal amounts, against the losing party;[197] and (3) requiring records to be printed, not

---

the Workman's Compensation Commission, the Oil and Gas Board, or the County Board of Supervisors.

[191] "The device of certiorari has been chiefly responsible for the U.S. Supreme Court's being able to keep its head above water." Winters, *supra* note 129, at 31. Perhaps a more extensive use of this writ could do the same for the Mississippi Court.

[192] In Mississippi the time allowed for oral argument is discretionary with the court. *See* MISS. SUP. CT. R. 10. Generally it is limited to 30 minutes for each side. *See* Interview with Chief Justice Gillespie, *supra* note 24.

[193] Assuming that the case would not be summarily affirmed. *See* Breen, *supra* note 105, at 233. *But see* Dethmers, *supra* note 130, at 160.

[194] Dethmers, *supra* note 130, at 160. This due process right has been disputed by others:

> There is more than a germ of truth in the concept that due process ought to be adequately served by one day in court and no more, and the best long-range way to relieve the appellate courts is to upgrade the ability and performance of the trial judges to the point where in all but a minimum of exceptional cases their judgments will be right and accepted as final.

Winters, *supra* note 129, at 32. *See also* State *ex rel* Brown v. Poplarville Sawmill Co., 119 Miss. 432, 81 So. 124 (1919); Tydings, *Ensuring Rational Sentences — The Case for Appellate Review*, 53 J. AM. JUD. SOC'Y 68 (1969).

[195] However, a recent survey indicated that only 5.4 percent of the high court judges from states without intermediate appellate courts advocated such restrictions, while 66.2 percent strongly opposed them. *See* CONGESTION AND DELAY, *supra* note 130, at 10.

[196] The present filing fee in Mississippi of only $3 is in itself grossly inadequate.

[197] *See* Breen, *supra* note 105, at 233. The federal courts have long had a statute (since

typewritten.[198] Although this method obviously works, its constitutionality is at least questionable as it appears to discriminate in favor of the more affluent litigants.[199] It is also doubtful that additional costs would deter those litigants in civil cases who have already contributed a substantial amount of time, money, and emotion, if there is any possibility of reversal with an additional contribution of only a fraction of the initial investment.[200] Such a limitation in criminal proceedings would doubtless result in a denial of due process.[201]

Mississippi has recently adopted legislation which reduces the time for appeal after final judgment from 90 to 45 days.[202] A reduction in time to perfect an appeal should, theoretically at least, reduce the amount of time required for final adjudication of the case.[203] It will undoubtedly

---

1789) to assess damages or double costs for frivolous appeals, but only 24 litigants have ever been assessed damages under the statute. *See* 28 U.S.C. § 1912 (1964); Carrington, *supra* note 129, at 569-70.

[198] South Carolina has adopted the requirement of printed records, resulting in "[t]he simplest kind of civil case . . . [requiring] an expenditure of $400 to $500, in addition to attorney's fees." INSTITUTE OF JUDICIAL ADMINISTRATION, THE JUDICIAL SYSTEM OF SOUTH CAROLINA 11 (1971). The results are striking. Though the state has 300,000 more people than Mississippi, in 1970 its supreme court heard less than one-half the number of cases appealed to the Mississippi Supreme Court. Since it does not have an intermediate appellate court or a high docketing fee, this decreased workload is attributable almost exclusively to the increase in appeal costs by the printing requirement. *Compare id.* at 10, 11, *with* Eighth Annual Report, *supra note 8.*

[199] On its face such restrictions obviously deny indigents and poor claimants their right to appeal even in cases where appeal is a constitutional right (e.g., an unconstitutional statute). For such an increase to be constitutional it must be accompanied by a provision excepting those who are indigent and therefore unable to appeal under any circumstances because of the expense. Theoretically at least the statute would then be aimed at middle to upper-class claimants to insure that, before appeal, the appellant must weigh the advantages of appeal with the substantial costs. However, the costs and time of determining and administering the exceptions is probably much more than any advantages such a system may have, and therefore the authors do not recommend such increases. *See* Stuart, *supra* note 69, at 603.

[200] *See* Carrington, *supra* note 129, at 570.

[201] It seems that most of the increased burden of the court has, in recent years, stemmed from criminal appeals in light of the U.S. Supreme Court's more lenient decisions involving rights of the criminally suspect. The number of criminal cases in the state supreme court increased from 131 in 1971, to 196 in 1972. *See* Address by Chief Justice Gillespie, *supra* note 56; Seventh Annual Report, *supra* note 16.

[202] *See* Act of May 8, 1972, ch. 459, [1972] MISS. GEN. LAWS 581.

[203] However, the time required for transcription of the record would remain constant. There are no statistics available on the average time between final judgment and when the appeal is filed or perfected. If all appeals in 1972 were filed between 80 and 90 days after final judgment, this reduction in time for appeal would have a substantial effect on the time required for final adjudication of a case. However, if most appeals were filed around 45 days after judgment, such a reduction would obviously, have little or no effect. *See* Eighth Annual Report, *supra* note 8.

discourage appeals by decreasing the time in which to determine the merits of appeal and to prepare for it and, therefore, lessen, to some extent, the present caseload.[204] The actual effect this method will have on the supreme court's caseload will not be known for at least a year.[205]

E. Temporary Remedies

There are also two temporary remedies which could be implemented if the backlog of cases reaches emergency proportions. Both methods involve the employment of lower court judges or retired supreme court judges to hear supreme court cases.

First, they could either be used as additional supreme court judges who hear and decide cases, and write opinions, or they could be used like most court commissioners who hear cases and write opinions with no vote on the decision of the case.[206] This method, though obviously helpful, has several objections: (1) the lower court judges are also overburdened by crowded dockets of their own;[207] (2) lower court judges are generally inexperienced in the research, preparation, decision, and opinion-writing processes of an appellate court;[208] and (3) lower court judges are not elected by the people of the district or state to be supreme court justices.[209]

The second temporary solution would be to appoint several lower-court or retired judges to act as a temporary appellate court.[210] However, the same objections as voiced against the first temporary method would apply.[211] Additionally, the temporary court must be given final jurisdiction in order to reduce the caseload.[212] Such jurisdiction must be established at least by statute, if not by constitutional amendment. Moreover, such final jurisdiction in the hands of a temporary court would diminish the status of the higher court[213] and, additionally, could present constitutional problems.[214] One final objection is that a permanent, not a temporary remedy is needed to alleviate the present congestion.[215]

---

[204] This reduction of the caseload is thought to be merely a by-product and not the intent of the legislation. The constitutionality of this type of statute has not yet been determined.

[205] *See* The Mississippi Law Research Institute, *supra* note 169, at 8.

[206] The state of Washington adopted, in 1962, a constitutional amendment authorizing judges or retired judges of lower courts to serve temporarily on the supreme court. The pro tem judge has the same power as a regular justice, but no more than one temporary judge can sit with the court at any one time. The opinions of the pro tem judges are published as court opinions but are designated on record as being written by the judge pro tempore. *See* Wash. Const. art. IV, § 2a (38th Amend. 1962). Though it seems that the pro tem judge has been helpful (increasing the cases decided by approximately 90 per year), the lack of experience in writing opinions is evident in those decisions written by them. *See* Colorado Legislative Council, Intermediate Court of Appeals for Colorado 35, 36 (Research Pub. No. 138, November 1968).

Oregon has a similar statute for the appointment of retired judges or lower court judges as temporary judges. Ore. Rev. Stat. § 2.052 (1953). Between 1963 and 1968 these judges wrote 20 to 74 opinions for the court each year. *See* State Court Administrator, Nineteenth Annual Report Relating to Judicial Administration in the Courts of Oregon (1972); Office of the Senate Court Administrator, The Courts of Oregon 3 (1972).

[207] *See* Stuart, *supra* note 69, at 602.

[208] *See* Nineteenth Annual Report, *supra* note 206.

[209] This is the same objection as voiced against court commissioners. *See* Dethmers, *supra* note 130, at 159.

IV. A PERMANENT LOWER APPELLATE COURT

The most permanent and effective way of reducing the workload at the highest level of a state court system is the creation of a lower appellate court.[216] As of 1971, at least 23 states, including Alabama, Colorado, Louisiana, North Carolina, and Tennessee had a lower appellate level in their court system.[217] This method of workload reduction is greatly favored by both judges[218] and commentators.[219] However, since the lower appellate court usually represents a rather radical change in the court system into which it is introduced, it has been the subject of a great deal of criticism.[220]

---

[210] *See* Comment, *supra* note 69, at 554.

[211] The crowded dockets of the lower courts would make it even more difficult to obtain three or more lower court judges who were all free at the same time to hear appeals. *See* Stuart, *supra* note 69, at 602.

[212] Obviously, without final jurisdiction the intermediate appellate court would serve only to delay the ultimate adjudication of a case and would not reduce the workload of the final appellate court. *See* text at notes 250 to 255 *infra*.

[213] *See* THE MISSISSIPPI LAW RESEARCH INSTITUTE, *supra* note 169, at 9.

[214] The establishment of any such temporary court may require a constitutional amendment, for such authority does not now lie in the Mississippi Constitution. The establishment of a permanent intermediate appellate court would require no more effort and could present a lasting solution to the case overload problem.

[215] Comment, *supra* note 69, at 554.

[216]
> Since there seems little prospect for a long-run decline in the volume of appellate litigation, once the surge of appellate cases has been felt in a state having only one appellate court, steps should be taken forthwith to establish an intermediate appellate court rather than temporizing with substitute arrangements.

ABA ON STANDARDS, COURT ORGANIZATION *supra* note 19, § 1.13, commentary at 29.

[217] UNITED STATES DEPARTMENT OF JUSTICE/LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL SURVEY OF COURT ORGANIZATION 1971 4 (Prelim. Draft June 1972).

[218] Of 87 high court judges from states not having intermediate appellate courts, 47 (or 54 percent) *strongly* advocated adoption of an intermediate appellate court while only 20 (or 23 percent) strongly opposed it. CONGESTION AND DELAY, *supra* note 130, table 9 at 10. The judges of Mississippi's highest court are listed among those advocating an intermediate appellate court. *Id.* table 19 at 25. The Chief Justice of the Mississippi Supreme Court has stated that he strongly favors such a court. Interview with Chief Justice Gillespie, *supra* note 24.

[219] COLORADO LEGISLATIVE COUNCIL, *supra* note 206; Lilly & Scalia, *Appellate Justice: A Crisis in Virginia*, 57 VA. L. REV. 3 (1971); SECOND BIENNIAL REPORT OF THE JUDICIAL COUNCIL OF OREGON (December 2, 1968).

The introduction of a lower appellate court into a court system can be very beneficial; however, if improperly organized it can also worsen the situation which it was created to improve. Beneficially, (1) the lower appellate court can reduce the workload of the highest appellate court thus allowing an improved work product,[221] (2) it allows a division of the workload between the lower and highest appellate court keeping both from being overworked,[222] (3) it allows the traditional American concept of the right to one appeal in every case to be retained,[223] and (4) in some cases, allows the appellate court to accommodate more litigants.[224] Its critics cite as its objectionable characteristics; (1) increased expense to the taxpayer for additional courts,[225] (2) instances of double appeals causing increased delay and expense to the litigants,[226] and (3) the creation of additional work for the highest level in settling disputes over original appellate jurisdiction.[227]

---

[220] *See, e.g., The Case for a Two-Level State Court System*, 50 J. **Am. Jud. Soc'y** 185 (1967); Barnes, *Courts, Lawyers and Taxpayers*, 30 **Fla. B.J.** 162 (1956); Sunderland, *The Problems of Appellate Review*, 5 **Texas L. Rev.** 126, 132-39 (1926). Professor Sunderland has been an outspoken critic of the use of intermediate appellate courts. Sunderland, *Intermediate Appellate Courts*, 6 **Am. L. School Rev.** 693 (1929), reprinted at 14 J. **Am. Jud. Soc'y** 54 (1930).

[221] *E.g.*, the North Carolina Supreme Court wrote 473 opinions in 1967 at an average of 6.15 pages per opinion. An intermediate appellate court was introduced into the system in 1968. In 1969, the court wrote 69 opinions at 11.7 pages per opinion. Groot, *The Effects of an Intermediate Appellate Court on the Supreme Court Work Product: The North Carolina Experience*, 7 **Wake Forest L. Rev.** 548, 562-66 (1971). *See also* **Intermediate Appellate Courts**, *supra* note 4, at 9; **Colorado Legislative Council**, *supra* note 206, at 49.

[222] A final appellate court might retain somewhat less than one-half of its original appellate jurisdiction with the remainder being given to the intermediate appellate court. *Alabama Appellate Court Congestion supra* note 157, at 164. The original jurisdiction retained by the court should be in areas which would be more likely to come to the highest court anyway by way of discretionary review; *e.g.*, felonies punishable by death, life imprisonment or imprisonment for greater than 15 years. *See, e.g.*, Steed, *The North Carolina Court of Appeals—An Outline of Appellate Procedure*, 46 N.C.L. **Rev.** 705, 708 (1968).

[223] Breen, *supra* note 105, at 233; Winters, *supra* note 129, at 31.

[224] **Colorado Legislative Council Report**, *supra* note 206, at 49; **Intermediate Appellate Courts**, *supra* note 4, at 9.

[225] Dethmers, *supra* note 130, at 161; Barnes, *supra* note 220.

[226] **Intermediate Appellate Courts**, *supra* note 4, at 9; Dethmers, *supra* note 130, at 161; Dodd, *The Problems of Appellate Courts*, 6 **Am. L. School Rev.** 681, 688 (1929); Sunderland, *supra* note 220, at 134.

[227] R. **Pound**, *supra* note 28, at 241; Dethmers, *supra* note 130, at 161; Sunderland, *supra* note 226, at 137. *But see* Dodd, *supra* note 226, at 688-89 (stating that similar problems exist in some cases of divisional sitting).

There are two parameters by which the jurisdiction of a lower appellate court is determined: (1) the geographical area from which appeals are brought to the court and (2) the subject matter of the cases which the court hears.[228] Based on the first parameter there are two types of lower appellate courts: one which draws its cases from the entire state[229] and one which draws its cases from a geographical subdivision of a state.[230] The principal advantage of a lower appellate court which draws its cases from an entire state is that there need be only one court. This single court system is attractive because of its low cost and administrative efficiency[231] (since there need be only one chief judge, one permanent court facility, one clerk, and one library). This is not to say that the court should be bound to sit in only one location[232] since to do so would provide no more convenience to litigants than the highest court.[233] However, excessive locational changes should be avoided because of inconvenience to the judges and increased cost of court maintenance (since low cost is one of the principal advantages of this system).

The second type of lower appellate court based on geographical area draws its cases from a certain geographical subdivision within a state. This system anticipates several coordinate lower appellate courts exercising appellate jurisdiction over cases within a certain area.[234] The principal advantage of this system is that it places an appellate court nearer to more litigants, making appeal more convenient.[235] The disadvantages of such a system are: (1) high cost to the taxpayers[236] (since the system anticipates several permanent courts and, therefore, several court facilities and libraries) and (2) a new class of cases over which the highest appellate court must exercise appellate jurisdiction to preserve uniformity of law; *i.e.*, those cases in which the lower appellate courts have rendered conflicting decisions.[237]

---

[228] Although these parameters are considered separately for purposes of discussion, subject matter jurisdiction and territorial jurisdiction must be considered together in determining the best type of lower appellate court in a particular situation.

[229] Seventeen jurisdictions use a lower appellate court which draws its cases from the entire state: Alabama, Arizona, Colorado, Connecticut, Georgia, Indiana, Maryland, Michigan, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Texas (Criminal Court of Appeals), Tennessee (Court of Criminal Appeals), and Washington. SURVEY OF COURT ORGANIZATION, *supra* note 217, at 4; COLORADO LEGISLATIVE COUNCIL REPORT, *supra* note 206, at 54-56; Lilly & Scalia, *supra* note 219, at 22-26.

[230] Ten jurisdictions use lower appellate courts which draw their cases from geographical subdivisions of the state: California, Florida, Illinois, Louisiana, Missouri, New York, Ohio, Tennessee, Texas and the Federal System. 28 U.S.C. §§ 41, 43(a) (1970); SURVEY OF COURT ORGANIZATION, *supra* note 217, at 4; COLORADO LEGISLATIVE COUNCIL REPORT, *supra* note 206, at 54-56; Lilly & Scalia, *supra* note 219, at 22-26.

[231] *Cf.* THE INSTITUTE OF JUDICIAL ADMINISTRATION, THE JUDICIAL SYSTEM OF TENNESSEE 25 (October 1971).

[232] *E.g.*, the Colorado Court of Appeals is authorized to hear oral argument in any county seat in the state though the court is permanently located in Denver. COLO. REV. STAT. ANN. § 37-21-7 (Perm. Cumm. Supp. 1969).

[233] Allowing panels or divisions of the court to sit in several locations will alleviate the inconvenience somewhat. However, if this is carried to the extent of permanent divisions located in several places within the jurisdiction it is a single appellate court in name only and is subject to the same disadvantages as the subdivided lower appellate court. *See, e.g.*, WASH. REV. CODE ANN. §§ 2.06.020-.040 (Supp. 1972).

[234] For jurisdictions having such a system see note 230 *supra*.

In determining which type of the two lower appellate courts is preferable for a particular jurisdiction, several factors, including population, geographical size, urbanization (population distribution), and reasonable judicial expenditure, should be considered. Most of the more populous and geographically large (or oddly shaped) jurisdictions have chosen the subdivided lower appellate court[238] as have many of the states with several urban centers.[239] On the other hand, most of the less populous states have chosen lower appellate courts which draw their cases from the entire jurisdiction.[240]

The second parameter used in measuring the jurisdiction of a lower appellate court is the subject matter of the cases which it hears. Based on this parameter there is an endless variety of lower appellate courts. At one extreme is the type of court to which all (or nearly all) appeals go from trial court.[241] At the other is the type to which only a single class of cases is appealable.[242]

Usually, in the case of the lower appellate court to which all (or nearly all) appeals go, a "screening" effect is created whereby only certain classes of cases are allowed to be appealed further to the highest appellate court.[243] Although this system greatly reduces the work of the highest court[244] and, in addition, interjects the scholarly opinion of the lower appellate judges into the process, it is subject most strongly to one of the main objections to lower appellate courts; that is, the frequency of double appeals, which by definition must occur in nearly every case heard by the highest court, causing delay and increased expense to the litigants.[245] Additionally such a court will require more judges than a court of more limited jurisdiction since its caseload will be greater and, therefore, the court will be more expensive to operate.[246]

---

[235] Means, *Florida's District Court of Appeal*, 33 **Fla. B.J.** 1208-09 (1959).

[236] Barnes, *supra* note 220, at 162.

[237] *See, e.g.*, **Fla. Const.** art. 5, § 3(b)(3).

[238] *E.g.*, California, Florida, Texas, and the Federal System. *See* note 230 *supra*.

[239] Ohio and Illinois. *See* note 230 *supra*. Louisiana's adoption of such a court was probably for historical reasons. Hood, *History of the Court of Appeals in Louisiana*, 21 **La. L. Rev.** 531 (1961).

[240] *E.g.*, Alabama, Colorado, and Washington. *See* note 229 *supra*. It is worthy of note that even larger states, such as Pennsylvania, have a single lower court.

[241] *See, e.g.*, N.C. **Gen. Stat.** §§ 7A-26 to -29 (1969). In all cases except those which include a sentence of death or life imprisonment, appeal is to the court of appeals. *Id.* § 7A-27(a).

[242] Alabama, Oklahoma, Tennessee, and Texas all have a court of appeals whose subject matter jurisdiction is limited to criminal cases. **Ala. Code** tit. 13, § 111(2) (Supp. 1971); **Okla. Stat. Ann.** tit. 20, § 40 (1962); **Tenn. Code Ann.** § 16-448 (Supp. 1972); **Tex. Const.** art. 5, § 5.

[243] Such appeals are usually those of great public or private importance. For example, in North Carolina, the supreme court may take a case before or after the decision of the court of appeals if the question is one of "significant public interest" or involves "legal

The specialized lower appellate court (one which hears only a certain type of case) is most suitable in a jurisdiction whose congestion is primarily due to one type of case; *e.g.*, the criminal case, which particularly lends itself to disposition by a court of experts. This type of court is subject to the objection of double appeals though much less so than the "screening" type.[247] It is also felt by many that judicial specialization and courts of special jurisdiction are undesirable.[248] Practically speaking, it is difficult to attract the caliber of judges necessary to man a court which specializes in a particular field.[249]

It appears then that the major thrust in legislative design of a lower appellate system must be toward the limitation (or hopefully elimination) of double appeals; that is, finality and the prevention of jurisdictional disputes between the lower and highest appellate courts. Although total elimination of double appeals may well be impossible if the highest court is to be able to shape the law of the jurisdiction,[250] they

---

principles of major significance" to state jurisprudence. N.C. GEN. STAT. § 7A-31 (1969). This statute also provides for discretionary review where delay may cause substantial harm, the decision of the court of appeals "appears likely to be in conflict with a decision of the Supreme Court," or where the workload of the courts is affecting "expeditious administration of justice." *Id.* Certain cases are always appealable from the court of appeals to the supreme court: substantial questions of state or federal constitutional law, cases in which there is a dissent, and a rate-making case involving the North Carolina Utilities Comm. *Id.* § 7A-30.

[244] *E.g.*, the North Carolina Supreme Court wrote 473 opinions in 1967. An intermediate appellate court was introduced into the system in 1968. In 1969, the court wrote only 69 opinions. Groot, *supra* note 221, at 562-66.

[245] INTERMEDIATE APPELLATE COURTS, *supra* note 4, at 9.

[246] Panels or divisions in the lower appellate court may somewhat alleviate the need for more judges in such a court. *See* text accompanying notes 128-51 *supra.*

[247] The Court of Criminal Appeals of Texas, however, has *final* jurisdiction of all criminal cases appealled in the state. TEX. CONST. art. 5, § 5; *Ex parte* Mode, 77 Tex. Crim. 432, 180 S.W. 708 (1915).

[248] INSTITUTE OF JUDICIAL ADMINISTRATION, A STUDY OF THE LOUISIANA COURT SYSTEM 222 (March 1972); THE JUDICIAL SYSTEM OF TENNESSEE, *supra* note 231, at 25.

[249] LOUISIANA COURT SYSTEM, *supra* note 248, at 222; THE JUDICIAL SYSTEM OF TENNESSEE, *supra* note 231, at 24.

[250] Dethmers, *supra* note 130, at 162. The Supreme Court of Texas has relinquished all control over criminal cases in order to give the Texas Court of Criminal Appeals final

should be limited to the furthest possible extent. In order to limit double appeals in those jurisdictions which determine that a split of the caseload between the highest court and the lower appellate court is the most beneficial method, those cases which are of sufficient importance to be heard by the highest court should be anticipated.[251] Only these anticipated cases should be appealed directly to the highest court with all other cases going to the lower appellate court. No appeal of right should be allowed from the lower appellate court to the highest court,[252] since this would assure double appeals when they may be unnecessary. Instead *all* cases reviewed by the lower appellate court should be considered only on a petition for a writ of review.[253] The situations for which a writ of review may be obtained should be *clearly* and *simply* set out in the legislation creating the lower appellate court.[254] All other cases must

---

jurisdiction. Tex. Const. art. 5, § 5; *Ex parte* Mode, 77 Tex. Crim. 432, 180 S.W. 708 (1915). One article suggests a system for those jurisdictions where appeals are not constitutionally guaranteed. Under this system all appeals are filed with the highest court which considers them as it would a petition for leave to appeal. Those found to be of great public or personal importance would be retained and heard in full; the others would be transferred to the lower appellate court subject to review by the highest court only in the most exceptional cases. Lilly & Scalia, *supra* note 219. For Virginia's highest court, which already considers all cases on petition before hearing appeals, this system could reduce the workload. However, in those states which, like Mississippi, now consider all cases on their merits, this would not substantially reduce the workload of the highest court.

[251] Any such division of jurisdiction has been attacked as arbitrary. Sunderland, *supra* note 220, at 133. A division based merely on jurisdictional amount may well be arbitrary. Colorado Legislative Council Report, *supra* note 206, at xxxi. However, certain classes of cases which are of sufficient public or individual importance may be anticipated and routed directly to the highest court. Colorado considers all criminal cases of sufficient individual importance to be reviewed by the state's highest court. Colo. Rev. Stat. Ann. § 37-21-2(1)(b) (Perm. Cumm. Supp. 1969); Colorado Legislative Council Report, *supra* note 206, at xxxii. *Cf.* La. Const. art. 7, §§ 10, 29 (all cases imposing "imprisonment exceeding six months" or "a fine exceeding three hundred dollars"). The Institute of Judicial Administration and the American Bar Association are opposed to this allocation and suggest that only cases involving the death penalty and life imprisonment be appealable directly to the highest court. Louisiana Court System, *supra* note 248, at 233-34; ABA Model Judicial Article § 3, ¶ 2B in 48 N.D.L. Rev. 253 (1972) (including "imprisonment for a term of 25 years or more"). Direct appeals to the highest court in civil cases are usually limited to those involving the validity of a statute or ordinance, those in which the state or federal constitutions are construed, those involving a rate-making decision of a state commission regulating public utilities and those involving revenue matters. *See, e.g.*, Colo. Rev. Stat. Ann. § 37-21-2 (Perm. Cumm. Supp. 1969); La. Const. art. 7, § 10; Wash. Rev. Code Ann. § 2.04.030 (Supp. 1972).

[252] Dethmers, *supra* note 130, at 162. *But cf.* N.C. Gen. Stat. § 7A-30 (1969); Ill. Ann. Stat. ch. 37, § 32.2 (Smith-Hurd 1972).

[253] To prevent the highest court from becoming overwhelmed with petitions for a writ of review, the highest court might be expanded by three members and allowed to create a panel of three judges on a rotating basis to consider petitions for a writ of review.

[254] *E.g.*, where there is a dissent in the lower appellate court or where the decision

be expressly declared to be final when disposed of by the lower appellate court.[255]

Where it is decided to divide the appellate caseload between the highest court and the lower appellate court, the division of jurisdiction must be simple and certain to avoid jurisdictional disputes.[256] Because of the possibility of generating more work for the highest court,[257] great care should be taken in determining and describing the jurisdiction of the intermediate appellate court. Consideration should be given to areas of recently increasing litigation, and the individual or public importance of those areas of the law.[258] Additionally, the highest court must have the power to transfer to itself any case in which the lower appellate court certifies that a substantial jurisdictional dispute has been raised and to summarily determine the proper jurisdiction.[259]

Flexibility is the cornerstone of a successful lower appellate system.[260] Since the main purpose of a lower appellate system is to maintain the highest court's workload at a manageable (and hopefully optimal) level, the system must not only be able to adapt to increased appellate demands but to anticipate them. Since there is no reason to expect the increase in appellate litigation to subside, this ability is critical.[261] More judges, additional clerical and legal assistance, and realignment of jurisdiction between the highest court and the lower appellate court should be anticipated.[262] Panels or divisional sittings of the lower appellate court may be necessary and should be provided for, though not re-

---

involves matters of great public importance. Dethmers, *supra* note 130, at 162; Second Biennial Report, *supra* note 219, at 19. Some states even require that appeal from the lower court will be considered only after the denial of a petition for rehearing. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-120.24 (Supp. 1972). *But see* Louisiana Court System, *supra* note 248, at 233.

[255] *See, e.g.*, Ind. Ann. Stat. § 4-215 (1968).

[256] Second Biennial Report, *supra* note 219, at 19. Questions of settled law should be heard by the lower appellate court, *e.g.*, domestic relations and probate matters, while the newer areas of the law should be shaped by the highest court. *Id.*; *see* note 251 *supra*.

[257] It has been said that "[e]very restriction to ward off appeals creates litigation over the force and effect of the restriction itself." Sunderland, *supra* note 220, at 127. *See also The Allocation of Original Appellate Jurisdiction in Missouri*, 1964 Wash. U.L.Q. 421 (a 317 page symposium on jurisdictional problems of Missouri's appellate court).

[258] Due to the recent practice adopted by the Mississippi Supreme Court of maintaining the statistics of their workload, the trends of appellate litigation may be determined in Mississippi.

[259] *See, e.g.*, Colo. Rev. Stat. Ann. § 37-21-10 (Perm. Cumm. Supp. 1969). The power to transfer cases on certification from the lower appellate court when the lower court's excessive caseload requires it is a necessary element of flexibility. *See, e.g.*, *id.* § 37-21-9(2).

[260] *See* Congestion and Delay, *supra* note 130, at 2.

[261] *See* Part I, *supra*.

[262] Means, *supra* note 235, at 1212; Second Biennial Report, *supra* note 219, at 20.

quired.[263] The power to initiate such changes should lie with the body most aware of the need and most capable of designing the necessary changes; *i.e.*, the highest court.[264]

Unfortunately, even in the administration of justice, cost is a necessary consideration. It is impossible to determine from published data exactly how much lower appellate courts have cost other states since court financing is split between state and local governmental units.[265] One method of estimating the cost of a simple lower appellate system is to multiply the cost (excluding salaries) of maintaining a justice of the highest court times the number of lower court judges desired.[266] As the lower appellate system becomes more complex; *e.g.*, several permanent divisions, this type of estimate will be unsatisfactory.[267] Although the lower appellate system will increase the cost of the administration of justice, this factor should not be prohibitive.[268]

V. CONCLUSIONS AND RECOMMENDATIONS

In any high court where congestion exists at a level which hinders that court in the performance of its functions,[269] steps must be taken to relieve that congestion. Such a situation exists in the Mississippi Supreme Court.[270] A great many of the above discussed measures have been implemented in Mississippi[271] yet the workload continues to grow. These measures, though certainly helpful,[272] have not proven to be solutions but have merely forestalled the burden under which the court now labors.[273] What can be done? Three additional measures deserve the immediate attention of the legislature.

---

[263] *See* LOUISIANA COURT SYSTEM, *supra* note 248, at 232-33; *e.g.*, ORE. REV. STAT. § 2.570(1) (1971).

[264] *Cf.* THE JUDICIAL SYSTEM OF TENNESSEE, *supra* note 231, at 28.

[265] INSTITUTE OF JUDICIAL ADMINISTRATION, STATE AND LOCAL FINANCING OF THE COURTS (tentative report 1969).

[266] Comment, *supra* note 69, at 559-60.

[267] *Id.*

[268] Oregon estimated the total cost of a lower appellate system at $533,072 for a 2-year period. SECOND BIENNIAL REPORT, *supra* note 219, at 20. Cost per judge of the lower appellate system (excluding salaries and travel expenses) in four other states were: $12,500 in Georgia, $10,700 in Indiana, $27,000 in one division of Missouri, and $14,600 in one division of Louisiana. INTERMEDIATE APPELLATE COURTS, *supra* note 4, at 9 n.17.

[269] For a discussion of these functions and the effect of congestion on them see Part I, *supra*.

[270] *See id.*

[271] *E.g.*, the Mississippi Supreme Court sits in divisions to hear almost all cases, uses law clerks, and has recently adopted a modified form of court commissioner; *i.e.*, the supernumerary justice. MISS. CONST. art. 6, § 149A; MISS. CODE ANN. § 9-3-27 (1972), *formerly* MISS. CODE ANN. § 1993 (1942); Miss. Gen. Laws ch. 452 (1973).

[272] The Chief Justice of the Mississippi Supreme Court has stated that it would have been impossible for the court to keep abreast of its workload were the court not allowed to sit in divisions. *Cf.* interview with Chief Justice Gillespie, *supra* note 24.

First, our high court has continually requested and been denied a legislative grant to the rule-making power over Mississippi courts. Though this power is inherent in the judiciary, the cooperation of the legislature in re-affirming this power is desirable in order to maintain the independence of the judiciary.[274]

Secondly, the high court, and the lower courts of the state as well,[275] are desperately in need of an office to relieve the high court of its administrative burden.[276] An administrator and supporting staff should be appointed by the supreme court and subject to the court's dictates.

Third, the state also requires the establishment of a lower appellate system. The geographical size and population of the state presently require only a single lower appellate court, with jurisdiction over the more settled areas of the law, to greatly reduce the court's workload.[277] The lower court should initially consist of six judges authorized to sit in panels of three throughout the State to hear oral argument. The lower appellate court should have *final* jurisdiction of the cases which it hears subject to *discretionary* review by the supreme court only in certain limited instances.[278] The lower court should have the power to certify cases to the supreme court before hearing where the lower court is congested or where it feels that the question is of such personal or public importance as to require eventual review by the supreme court. The supreme court should have the power to transfer cases to and from the lower court as its needs require.

Under existing constitutional provisions, a lower appellate court may be established in Mississippi.[279] However, to retain public respect for the courts, this lower appellate court should be elevated to the status of a constitutional court with a broad and flexible grant of power to be regulated by the legislature on the advice of the supreme court.[280]

---

[273] *See* Lilly & Scalia, *supra* note 219, at 42-43.

[274] The term "continuance in office" relating to the prohibition against diminishing the salaries of the justices has never been interpreted in light of their 8-year term, thus giving the legislature an opportunity to exercise a great deal of control over the Court. MISS. CONST. art. 6, §§ 149, 166.

[275] In 1968, the single judge in Circuit Court District No. 15 disposed of 885 cases while the single judge in Circuit Court District No. 18 was required to dispose of only 264 cases. This imbalance could be remedied with the help of a central court administrator. MISS. JUD. COMM'N REPORT chart c-8 (1970).

[276] See Part II(A) *supra.*

[277] *E.g.*, if all contract, domestic relations, eminent domain, insurance, personal injury, property damage, workman's compensation, and estates cases and one-half of the other miscellaneous cases heard by the supreme court had been heard by a lower appellate court in 1973, the supreme court's workload (of cases heard on the merits) would have been reduced from 397 to a manageable 204 cases. Eighth Annual Statistical Report, *supra* note 8, table IV, at 12.

[278] *See* note 254 *supra.*

[279] MISS. CONST. art. 6, §§ 146, 172.

David H. Baker
W. David Watkins
Thomas Walter Tardy III

---

[280] *See, e.g.*, MODEL JUDICIAL ARTICLE § 3, ¶ 2B in 48 N.D.L. REV. 253 (1972).

MINIMUM FEE SCHEDULES V. ANTITRUST: THE GOLDFARB AFFAIR

Probably no issue has provoked more recent commentary from the various sectors of the bar than the so-called attorneys' "minimum fee schedules." The existence of such schedules dates from 1795 when the Providence County, Rhode Island, Bar Association passed the following resolution: "[N]o member shall give any opinion or advice upon any law question for a less sum than $1.00."[1] Today nearly 30 states and 600 local bar associations have adopted somewhat more sophisticated and certainly more inflated versions of this early prototype.[2]

Until recently the fee schedule controversy has been limited to a vigorous exchange of views between the proponents and opponents of attorney fee schedules in the various legal journals.[3] The major criticism which opponents have leveled at the schedules is that they are a form of price fixing in restraint of trade and therefore violative of the Sherman Antitrust Act.[4]

With the advent of prolific consumer-oriented litigation, it became inevitable that fee schedules would eventually be challenged in the courts. In December of 1972, the first case on point, *Goldfarb v. Virginia State Bar*,[5] was litigated in the Federal District Court for the Eastern District of Virginia.[6] The plaintiffs, Lewis H. Goldfarb, *et al*, brought a class action suit under the Sherman Act seeking injunctive relief and treble damages.[7] The court held that local and county fee schedules were, indeed, a violation of the Sherman Act, but that action taken by the state bar association in enforcing the fee schedule fell within a recognized exemption from the act.[8]

---

[1] Maxwell, *Bar Association Minimum Fee Bills: Their Impact Upon C.L.L.A. Practices*, 71 Com. L.J. 278 (1966).

[2] Arnould & Corley, *Fee Schedules Should Be Abolished*, 57 A.B.A.J. 655, 656 (1971); Maxwell, *supra* note 1, at 278.

The Arnould & Corley article cited 34 as the number of state bar associations which have adopted fee schedules. However, this figure must be read in light of a trend towards rescission of the schedules which has developed subsequent to the article's 1971 publishing date. At the time of this writing at least nine state bar associations, Delaware, Florida, Georgia, Massachusetts, Michigan, Mississippi, Missouri, Tennessee, and Wisconsin, have rescinded their fee schedules. One state, Alabama, has promulgated a new fee schedule since the *Goldfarb* decision was rendered.

[3] *Compare* Arnould & Corley, *supra* note 2 (opposing fee schedules); Comment, *The Wisconsin Minimum Fee Schedule: A Problem of Antitrust*, 1968 Wis. L. Rev. 1237 (opposing fee schedules); Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 Harv. L. Rev. 971 (1972) (opposing fee schedules); *with* Haberman, *Wisconsin's Experience With a Minimum Fee Schedule*, 34 J. Kan. B. Ass'n. 10 (1965) (advocating fee schedules); Jeffers, *Antitrust Law Misapplication to Minimum Fee Schedules*, 36 Tex. B.J. 201 (1973) (advocating fee schedules); Miller & Weil, *Let's Improve, Not Kill, Fee Schedules*, 58 A.B.A.J. 31 (1972) (advocating fee schedules).

[4] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C. § 1 (1964) [hereinafter cited as Sherman Act].

[5] 355 F. Supp. 491 (E.D. Va. 1973).

[6] It is clear that the Antitrust Division of the Justice Department was closely scrutiniz-

It is the purpose of this comment to analyze the *Goldfarb* decision in some depth, reflecting on both its accuracy and impact. Additional consideration will be given to the possible substitutes for fee schedules if indeed *Goldfarb* is the deathknell of fee schedules as they currently exist. It is hoped that the latter discussion will be of particular interest to the members of the Mississippi State Bar in light of the resolution adopted at the 1973 convention rescinding the bar's suggested fee schedule.[9]

I. GOLDFARB: THE FACTUAL CONTEXT

In January of 1972, Lewis Goldfarb, an attorney for the Federal Trade Commission, purchased a house in Reston, Virginia. Apparently he felt that he had been overcharged for services rendered in connection with the real estate closing. Thereafter, he wrote 36 law firms in northern Virginia to see if they would charge less for a title examination than the amount set forth in the minimum fee schedule.[10] Nineteen of the firms responded to his inquiry and indicated they would not deviate from the schedule.[11]

In February of 1972, Goldfarb filed a complaint seeking injunctive relief and damages in the amount of $1.2 million for himself and all others similarly situated.[12] Named as defendants were the Virginia State Bar and three local bar organizations: the Fairfax, Alexandria, and Ar-

---

ing the use of fee schedules during the same time period of the *Goldfarb* litigation. Thomas E. Kauper, Assistant Attorney General for the Antitrust Division recently stated: ". . . I think the legal profession has been given sufficient warning: fee-fixing by lawyers can run afoul of the antitrust laws. It may well be that our next warning will be in the form of a complaint." Address by Mr. Kauper before the New York Bar Association, January 24, 1973.

[7] *See* BNA ANTITRUST T. AND REG. REP. No. 552, at A-5 (1972), for a reproduction of Goldfarb's complaint.

[8] Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 496-97 (E.D. Va. 1973).

[9] "[T]he members of the Mississippi State Bar in convention assembled do hereby rescind any and all suggested minimum fee schedules heretofore published or adopted by it. . . ." (Excerpt from resolution adopted by the Mississippi State Bar on June 9, 1973).

[10] Note, *Minimum Fee Suit Set For Trial*, November-December VA. B. NEWS 35, at 36 (1972).

[11] *Id.*

[12] Goldfarb alleged $400,000 in actual damages which, as provided in the Sherman Act, trebled to $1.2 million.

lington County Bar Associations. Prior to trial the Alexandria and Arlington County Bar Associations agreed to a consent judgment whereby plaintiff dropped his action for damages in return for the defendants' recission of their fee schedules and promises to refrain from promulgating any in the future.[13] The Virginia State Bar rejected a similar pretrial offer on the grounds that it was exempt from the Sherman Act and that even if the instant case was settled, it would still be vulnerable to future suits of a similar nature.[14] The members of the Fairfax County Bar Association unanimously voted to remain in the suit along with the state bar.[15] After a brief trial Judge Albert V. Bryan rendered his decision in favor of the Virginia State Bar Association and against the Fairfax County Bar Association.

The opinion addresses itself initially to the question of whether minimum fee schedules are indeed price fixing within the meaning of the Sherman Act.[16] After deciding this question affirmatively, the court resolves three related jurisdictional issues:[17] (1) Is interstate commerce sufficiently affected? (2) Are legal services "trade" within the meaning of the Act? (3) Do the activities fall within a recognized exemption from the antitrust laws for "lawfully regulated state action?" An analysis of the precedent underlying the four key issues presented in *Goldfarb* will give insight into the accuracy of the decision.

II. GOLDFARB: A CRITICAL LOOK AT THE COURT'S ANALYSIS

A. *Are Minimum Fee Schedules Price Fixing?*

In antitrust litigation the following two theories have evolved in determining if a particular restraint violates the law: the "rule of reason" and "per se" illegality.

The Supreme Court first articulated the "rule of reason" in *Standard Oil Co. v. United States.*[18] The theory basically embodies a commonsense approach toward suspect commercial activities whereby the courts generally do not find an antitrust violation unless the public interest is unreasonably prejudiced.[19] The scope of the court's inquiry, being considerably broader than that required by the "per se" logic, includes consideration of the nature, purpose, and effect of the activity.[20] Generally, when applying the rule the courts have been receptive to mitigating factors which may indeed call for some limited restraint of trade.[21]

---

[13] Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 492 n.1 (E.D. Va. 1973).

[14] Note, *supra* note 10, at 35.

[15] *Id.*

[16] Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 493-94 (E.D. Va. 1973).

[17] *Id.* at 494.

[18] 221 U.S. 1 (1911).

[19] Nash v. United States, 229 U.S. 373, 376 (1912).

[20] Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); Standard Oil Co. v.

In contrast to the "rule of reason," certain activities are so onerous to the free-market system that their mere existence, without further inquiry, is a "per se" violation of the Sherman Act.[22] Price fixing was declared to be one such "per se" violation in *United States v. Trenton Potteries Co.*[23]

The fundamental questions that naturally follow are: What is "price fixing" within the meaning of *Trenton Potteries*, and do minimum fee schedules fall within this definition? The sweeping language laid down in *United States v. Socony-Vacuum Oil Co.*[24] provides some insight. There the Court, in essence, said that price fixing is *any* combination which tampers with price structures regardless of the machinery employed.[25] The *Goldfarb* court relied on language similar to that in *Socony-Vacuum,* and the line of cases which follow it, to conclude that attorney fee schedules were indeed a "per se" violation of the Sherman Act.[26] The defendant Fairfax Bar Association, on the other hand, urged that the court should more properly apply the "rule of reason."[27]

Despite the sweeping language of *Socony-Vacuum,* precedent exists for applying the "rule of reason" to devices which have a significant effect on price structures. For example, in *Appalachian Coals, Inc. v. United States*[28] the United States Supreme Court made the following

---

United States, 221 U.S. 1 (1911). *See generally* Montague, *"Per Se Illegality" And The Rule of Reason,* 12 ABA Antitrust L.J. 69, 70-71 (1958).

[21] *See, e.g.,* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) (where an "exclusive selling" agency which tended to affect prices was upheld because of the generally depressed state of the coal industry at that time and because the agency tended to correct certain production abuses which were occurring within the industry).

[22] In addition to price fixing herein discussed, some other activities which fall into the "per se" classification are division of markets, United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898); group boycotts, Fashion Originators' Guild of America, Inc. v. F.T.C., 312 U.S. 457 (1941); and tying arrangements, International Salt Co. v. United States, 332 U.S. 392 (1947). *See generally* Van Cise, *The Future of Per Se in Antitrust Law,* 50 Va. L. Rev. 1165 (1964).

[23] 273 U.S. 392 (1927). In United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 489 (1950), the Court went on to say that price fixing was "per se" unreasonable even though it may serve an honorable end.

[24] 310 U.S. 150 (1940).

[25] *Id.* at 221-22.

[26] Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 493-94 (E.D. Va. 1973). *See generally* Comment, *Minimum Fee Schedules As Price Fixing: A Per Se Violation of The Sherman Act,* 22 Am. U.L. Rev. 439 (1973).

[27] Post-trial Memorandum of defendant at 18-19, Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973).

[28] 288 U.S. 344 (1933).

interesting statement: "The fact that the correction of abuses may tend to stabilize a business, or to *produce fairer price levels,* does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade."[29] The permissive attitude displayed in *Appalachian Coals* has also carried over into the lower federal courts.[30]

In *Silver v. New York Stock Exchange*[31] the Supreme Court applied the "rule of reason" to a group boycott, another activity that normally calls for application of the "per se" logic.[32] The Court justified this because of the presence of a federal regulatory scheme.[33] The analogy which can be drawn between the federal regulatory scheme involved in *Silver* and provisions for certification and regulation of attorneys by the Virginia State Bar is intriguing. In light of the above mentioned authority one commentator has noted: "It is, therefore, apparent that not even price fixing always gets the *per se* treatment and that there is still room in an appealing case for an economic defense based upon reasonableness."[34] Moreover, it has even been suggested that "per se illegality" is a mere cliché and that in reality it is impossible to apply anything but the "rule of reason" to enforce the Sherman Act.[35]

The above discussion is not intended to imply that the *Goldfarb* court was incorrect in applying the "per se" concept to attorney fee schedules. Indeed the great weight of authority supports the court's conclusion. The purpose is merely to point out that the appropriateness of the "per se" rule is not totally unequivocal, and that the defendant's contention that the "rule of reason" should have been applied indeed has some merit.

More probably than not, even if the "rule of reason" had been applied to minimum fee schedules, the same result would have followed.[36] As previously discussed,[37] the "rule of reason" would have necessitated a broader scope of inquiry into such factors as the nature, purpose, and effect of the schedules, and the overall state of the legal profession; however, as is about to be shown, this probably would not have had a mitigating effect. In regard to the *nature* of the schedules: While the defendant Fairfax Bar Association characterized them as mere price dissemination tools,[38] they appear to be classic price-fixing devices inasmuch as an attorney may subject himself to disciplinary sanctions if he habitually undercuts them.[39] As for the *purpose* of the schedules: While proponents suggest that they are a reasonable effort to protect the public interest,[40] in reality the schedules are an obvious attempt to eliminate price competition. An excerpt from an opinion of the ABA Committee on Professional Ethics is particularly revealing; ". . . [P]rice bidding . . . could tend to reduce the profession of law to a mere money making business . . . ."[41] Inasmuch as competition has been described as essential to the preservation of liberty itself,[42] this position is patently unreasonable. Regarding the *effect* of fee schedules, one commentator concludes that they engender various resource misallocations and frustrate consumer preferences.[43] Another adverse effect of the schedules is that they create a floor below which no price competition will exist.[44] This prevents competitors from using their own judgment to value their services.[45] As for the *over-all state* of the legal profession: It certainly does not appear that the depressed state of the industry which prompted the Court to sanction a limited restraint of trade in *Appalachian Coals, Inc. v. United States*[46] is even remotely present with respect to the legal profession. In fact, one commentator has provided interesting statistical data which indicates that the legal profession is literally booming.[47]

---

[29] *Id.* at 374 (emphasis added); *accord* Chicago Board of Trade v. United States, 246 U.S. 231 (1918). In the *Socony-Vacuum* opinion Justice Douglas distinguished *Appalachian Coals* and *Chicago Board of Trade*; however, the distinction seems to be rather strained and artificial. 310 U.S. at 216-17.

[30] *See, e.g.,* United States v. Columbia Pictures Corp., 189 F. Supp. 153 (S.D.N.Y. 1960).

[31] 373 U.S. 341 (1963), *cited in* Post-trial Memorandum of defendant at 19, Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973).

[32] See note 22 *supra.*

[33] Silver v. New York Stock Exchange, 373 U.S. 341, 347-49 (1963).

[34] Thompson, *Analysis of Chapter I* [Att'y Gen. Nat'l Comm. Antitrust Rep.], *"A Policy Against Undue Limitations On Competitive Conditions,"* 7 ABA ANTITRUST L.J., 56 (1955).

[35] Montague, *supra* note 20, at 104.

[36] *Cf.* United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29, 35-36 (1962).

[37] *See* text accompanying notes 20-21 *supra.*

---

[38] Post-trial Memorandum of defendant at 19-20, Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973).

[39] *See* ABA COMM. ON PROFESSIONAL ETHICS, OPINION No. 312 (1961). *See generally* Woleslagel, *Price Cutting for Legal Services as a Violation of Legal Ethics,* 35 KAN. B. ASS'N. J. 19 (1966).

The ABA has considerably modified its position on fee-cutting by holding in a subsequent opinion that it no longer will be the basis for disciplinary action. ABA COMM. ON PROFESSIONAL ETHICS, OPINION No. 323 (1970). However, most of the state bar associations have similar threats of disciplinary action which remain intact. For example, opinion No. 170 of the Virginia Bar Association creates a presumption of unethical conduct for habitual fee-cutting.

[40] Post-trial Memorandum of defendant at 19, Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973).

[41] ABA COMM. ON PROFESSIONAL ETHICS, OPINION No. 292 (1957).

[42] Mueller, *Antitrust and Economics: A Look At "Competition,"* 10 ST. LOUIS U.L.J. 482, 483 (1966).

[43] Note, *supra* note 3, at 981.

[44] Mr. Goldfarb's failure to find an attorney who would undercut the fee schedule is a prime example.

[45] Keifer-Stewart Co. v. Seagram and Sons, 340 U.S. 211, 213 (1951).

[46] 288 U.S. 344 (1933).

In short, it doesn't appear that minimum fee schedules can survive scrutiny under either the "rule of reason" or the "per se" illegality tests.

B. *Is Interstate Commerce Affected?*

The basic jurisdictional requirement of the Sherman Act is that interstate commerce must in some way be affected.[48] Even where an activity is essentially intrastate, the Sherman Act will nevertheless have application so long as a substantial and adverse affect is shown upon interstate commerce.[49] Whether a local or intrastate activity substantially affects interstate commerce is primarily a factual question.[50] However an examination of legal precedent will provide some guidelines as to whether a broad or narrow test should be employed in making such a determination.

In *Atlantic Cleaners & Dyers v. United States*[51] the Supreme Court stated that when Congress enacted the Sherman Act it intended to exercise all the power it possessed under the commerce clause.[52] In the last quarter of a century the scope of the commerce clause has enjoyed virtually unbridled expansion.[53] It would seem to follow in light of *Atlantic Dyers* that the Sherman Act has likewise undergone a vast expansion, thereby calling for a broad test to determine if local legal services affect interstate commerce.[54] Indeed the Supreme Court has taken this precise position.[55]

On the other hand it has been suggested by one commentator that the courts have consistently applied a more stringent interstate commerce test in dealing with professional associations.[56] While there is precedent holding various aspects of the practice of medicine not to be within the jurisdictional ambit of the Sherman Act,[57] at least one of those cases implied that if price fixing had been involved a different result would have followed.[58] Moreover, precedent exists where a broad interstate commerce test was invoked against a professional association, a decision later affirmed by the Supreme Court.[59]

---

[47] FORBES, September 15, 1971, at 30-38.

[48] The Sherman Act provides, in part: "[E]very contract or combination . . . in restraint of trade or commerce . . . *among the several states* . . . is . . . illegal." (emphasis added).

[49] Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 234 (1948). *See generally* Kallis, *Local Conduct and the Sherman Act*, 1959 DUKE L.J. 236 (1959).

[50] Las Vegas Merchant Plumber's Ass'n v. United States, 210 F.2d 732, 747 (9th Cir. 1954).

[51] 286 U.S. 427 (1932).

[52] *Id.* at 435.

[53] *See generally* Light, *The Federal Commerce Power*, 49 VA. L. REV. 717 (1963); Morton, *Scope of the Commerce Clause As Evidenced in the Decisions of the United States Supreme Court*, 31 ICC PRAC. J. 374 (1964).

[54] *See generally* Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469, at 1473-76 (1961).

[55] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 556-59 (1944).

[56] Comment, *supra* note 26, at 448.

In short, the apparent laissez-faire attitude exhibited toward certain aspects of the medical profession does not necessarily reflect a conscious, across-the-board policy of narrowing the concept of interstate commerce with respect to professional services. Indeed the bulk of authority would suggest the opposite. Having concluded that a broad interstate commerce test is appropriate, the remaining inquiry involves primarily factual considerations.

The *Goldfarb* court limited its inquiry in this regard to an examination of legal services as they relate to real estate transactions. It cited three reasons why interstate commerce was substantially affected.[60] The first was that a significant portion of funds furnished for the purchasing of homes in Fairfax County, Virginia, came from without the state and nearly all of the institutions which make such loans require a title examination by an attorney. Secondly, the court pointed out that a large percentage of persons living in Fairfax County worked outside of Virginia. Thirdly, the court stated that a significant amount of the loans on Fairfax County real estate was guaranteed by federal agencies based in the District of Columbia.[61]

It is obvious that the court applied a broad test to determine if interstate commerce was affected. It has already been demonstrated that it was justified in doing so. Moreover, since the court's ruling was essentially a finding of fact, its conclusion may not be set aside unless it is "clearly erroneous."[62] Not only is the court's conclusion not "clearly erroneous," but when the entire gamut of legal services is considered, rather than just those relating to real estate transactions, it is apparent that the court was imminently correct in concluding that interstate commerce is substantially affected.[63]

---

[57] *See* United States v. Oregon Medical Soc'y, 343 U.S. 326 (1952); Spears Free Clinic & Hospital for Poor Children v. Cleere, 197 F.2d 125 (10th Cir. 1952), *cited in* Post-trial Memorandum of defendant at 5, Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973); Elizabeth Hospital, Inc. v. Richardson, 269 F. 2d 167 (8th Cir. 1959).

[58] Spears Free Clinic & Hospital for Poor Children v. Cleere, 197 F.2d 125, 126 (10th Cir. 1952).

[59] United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29 (D.C. Utah 1962), *aff'd mem.*, 371 U.S. 24 (1962).

It may be argued that *Utah Pharmaceutical* is factually distinguishable from *Goldfarb* inasmuch as the professional association involved was selling goods (prescription drugs), and not merely services, which undeniably involved interstate commerce. However, the court in *Utah Pharmaceutical* pointed out that both the *activities* of the pharmaceutical association *and* the goods which they sold were involved in interstate commerce. *Id.* at 33.

[60] Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 494 (E.D. Va. 1973).

[61] *Id.*

C. Are Legal Services Trade or Commerce?

The third issue resolved in *Goldfarb* concerned whether legal services are "trade or commerce" within the meaning of the Sherman Act. The court decided this question in the affirmative.[64] The defendant Fairfax Bar Association, on the other hand, urged that the learned professions, of which law is certainly a part, have traditionally enjoyed an exemption from the antitrust laws.[65] The gist of this "learned-profession" exemption, if one exists, is that professional services are not included in the terms "trade or commerce" as used in the Sherman Act. The history of this so-called exemption is somewhat ambiguous and deserves close scrutiny.[66]

The exemption can be traced to an early common law decision, *The Nymph.*[67] The crucial language from the opinion reads: "Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, *not in the liberal arts or in the learned professions,* it is constantly called a trade."[68] Thus, the opinion, written by Justice Story, expressly excluded the learned professions from the common law definition of trade. The Supreme Court, in a later case construing the Sherman Act, took the position that the terms of the act, at least in their rudimentary meaning, took their origin from the common law.[69] It would therefore appear to follow that the learned professions were excluded from the Sherman Act. In *F.T.C. v. Raladam Co.*[70] the Court, in dictum, seemed to reaffirm this.[71]

---

[62] FED. R. CIV. P. 52(a); *cf.* United States v. Oregon Medical Soc'y, 343 U.S. 326, 332 (1951).

[63] *See generally* Comment, *supra* note 26, at 450; Ferren & Snyder, *Antitrust and Ethical Aspects of Lawyer's Minimum Fee Schedules,* 7 REAL. PROP. PROB. & TR. J. 726, at 729-30 (1972); Note, *The Antitrust Division v. The Professions — "No Biding" Clauses and Fee Schedules,* 48 NOTRE DAME LAW. 966, at 969-70 (1973).

[64] Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 495 (E.D. Va. 1973).

[65] Post-trial Memorandum of defendant at 7-8, Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973).

[66] *See generally* Coleman, *The Learned Professions,* 33 ABA ANTITRUST L.J. 48 (1967); Nawalonic, *Motives of Non-Profit Organizations and the Antitrust Laws,* 21 CLEV. STATE L. REV. 97, at 108 (1972); Comment, *The Applicability of the Sherman Act to Legal Practice and Other "Non-Commercial" Activities,* 82 YALE L.J. 313 (1972).

[67] 18 F. Cas. 506 (No. 10,388) (C.C. Me. 1834). Although a district court ruling, *The Nymph* has been acquiesced in by subsequent Supreme Court opinions. *See* Nawalonic, *supra* note 66, at 108-09.

[68] *Id.* at 507 (emphasis added).

[69] Standard Oil Co. v. United States, 221 U.S. 1, 51 (1911).

Justice Stone in *United States v. South-Eastern Underwriters Association*,[72] took the express position that the practice of law was not commerce and was not subject to the Sherman Act.[73] While it is true that Justice Stone was apparently expressing his personal opinion, rather than the Court's, it is interesting to note that the Court has recently made reference to Justice Stone's comment without declaring it to be in error.[74]

On several occasions the Supreme Court has had the opportunity to take a direct position on the propriety of the "learned-profession" exemption and yet it has scrupulously avoided doing so.[75] In *American Medical Association v. United States*[76] the Court was squarely presented with the question of whether a physician was engaged in trade under the Sherman Act. The Court stated: "Much argument has been addressed to the question of whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act. . . . [W]e need not consider or decide this question."[77] Notwithstanding the Court's avoidance of a direct pronouncement in *American Medical Association,* one commentator has concluded that the overall effect of the decision is to cast some doubt on the "learned-profession" exemption.[78] In *United States v. National Association of Real Estate Boards*[79] the Court, while holding that personal services as well as goods are covered by the Sherman Act, again hedged on the opportunity to take a direct stand on the "learned-profession" exemption.[80] The Court avoided a third opportunity to articulate a position in *United States v. Oregon Medical Society*,[81] but nevertheless seemed to indirectly revitilize the exemption by once again intimating that the professions may receive some special treatment.[82]

---

[70] 283 U.S. 643 (1931), *cited in* Post-trial Memorandum of defendant at 8, Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973).

[71] "Of course, medical practitioners . . . are not in competition with respondent. They follow a profession and not a trade, and are not engaged in the business of making or vending remedies but in prescribing them." 283 U.S. at 653.

[72] 322 U.S. 533 (1944).

[73] *Id.* at 573.

[74] Flood v. Kuhn, 407 U.S. 258, 271-72 (1972).

[75] "Whether lawyers are exempt from the Sherman Act because they perform personal services as a learned profession has never been squarely met by the Supreme Court." Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 494 (E.D. Va. 1973).

[76] 317 U.S. 519 (1943).

[77] *Id.* at 528.

[78] Coleman, *supra* note 66, at 50.

[79] 339 U.S. 485 (1950), *cited in* Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 495 (E.D. Va. 1973).

[80] *Id.* at 491-92.

[81] 343 U.S. 326 (1952).

In contrast to the revitalization effect which *Oregon Medical Society* may have had on the exemption, the Court in 1962 affirmed without opinion a district court decision that "The fact that a pharmacist . . . is engaged in the practice of a learned profession does not immunize the defendant from the application of Section 1 of the Sherman Act."[83]

The Supreme Court's equivocation on whether or not a "learned-profession" exemption exists has led to a split of views in the lower federal courts. Some cases adopt the "learned-profession" exemption,[84] and others reject it.[85] At least one court, taking note of the Supreme Court's failure to resolve the issue,[86] chose to avoid it altogether.[87]

In *Marjorie Webster Junior College v. Middle State Association of Colleges and Secondary Schools*[88] the circuit court apparently went one step further in announcing what has been described as a new overlapping, but not identical, exemption for professional associations.[89] The gist of the court's ruling in *Marjorie Webster* is that traditionally "non-commercial" activities are exempt from the Sherman Act.[90]

On the other hand, it is quite apparent that the Antitrust Division of the Justice Department does not believe either a "learned-profession" or a "non-commercial" exemption exists. It has recently sought and obtained consent decrees enjoining suspect activities of certified public accountants,[91] civil engineers,[92] and architects.[93] Moreover, the Justice Department was clearly contemplating action of its own against the legal profession notwithstanding the *Goldfarb* litigation.[94]

---

[82]
> We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This Court has recognized that forms of competition usually in the business world may be demoralizing to the ethical standards of a profession.

Id. at 336.

[83] United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29, 33 (D.C. Utah 1962), *aff'd mem.*, 371 U.S. 24 (1962).

[84] *See* the District Court opinion in United States v. American Medical Ass'n, 28 F. Supp. 752 (D.D.C. 1939), *rev'd*, 110 F.2d 703 (D.C. Cir. 1940), *cert. denied*, 310 U.S. 644 (1940); *accord*, Riggal v. Washington County Medical Soc'y, 249 F.2d 266 (8th Cir. 1957).

[85] *See* United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29 (D.C. Utah 1962), *aff'd mem.*, 371 U.S. 24 (1962); *accord*, United States v. American Medical Ass'n, 110 F.2d 703 (D.C. Cir. 1940); Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973).

[86] Friends of Animals, Inc. v. American Veterinary Medical Ass'n, 310 F. Supp. 1016, 1017 n.1 (S.D.N.Y. 1970).

[87] "It is thus unnecessary to decide whether the practice of veterinary medicine is 'trade or commerce' within the purview of the Sherman Act." *Id.* at 1017.

[88] 432 F.2d 650 (D.C. Cir. 1970).

[89] *See generally* Comment, *supra* note 66, for an exhaustive discussion of the *Marjorie Webster* exemption.

[90] Marjorie Webster Junior College v. Middle States Ass'n of Colleges and Secondary Schools, 432 F.2d 650, 654 (D.C. Cir. 1969).

In light of the confusion surrounding the "learned-profession" exemption, the Supreme Court should take a direct position on whether or not one in fact exists. Perhaps *Goldfarb,* assuming it eventually reaches the Court, will provide a vehicle with which to do so. As one commentator points out:

> [I]t is apparent from a review of the entire list of exemptions that in most cases relief from antitrust standards and consequences is compensated for by a substitute enforcement device providing some assurance that the exemption will not be abused or that somehow the public interest will be protected in the absence of compulsory competition . . . .[95]

It is submitted that the "learned-profession" exemption has no such substitute enforcement device and that as a result the public interest is maligned. The Supreme Court should adopt the more reasoned position, as did the *Goldfarb* court, that the professions must compete in the free-market system just like any other money-making enterprise.

D. Do the Schedules Constitute State Action?

The last issue gave the court, by its own admission, the most trouble.[96] This concerned whether or not the Virginia State Bar or Fairfax County Bar Associations fell into a recognized exemption from the antitrust laws for lawfully regulated state action.[97]

The court held that action taken by the Virginia State Bar was included within the exemption.[98] It held, on the other hand, that action taken by the Fairfax County Bar Association did not, despite the bar's position to the contrary,[99] constitute lawfully regulated state action.[100]

---

[91] United States v. American Institute of Certified Public Accountants, Inc., Civil No. 1091-72 (D.C.D.C., July 6, 1972).

[92] United States v. American Soc'y of Civil Engineers, Civil No. 72 C 1776 (S.D.N.Y., June 1, 1972).

[93] United States v. American Institute of Architects, Civil No. 992-72 (D.C.D.C., June 19, 1972).

[94] *Supra* note 6.

[95] Pogue, *The Rationale of Exemptions From Antitrust,* 19 ABA ANTITRUST L.J. 313, 328 (1961).

[96] Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 495 (E.D. Va. 1973).

[97] For extensive treatment of the state-action exemption see Note, *State Action Exemption From The Antitrust Laws,* 50 B.U.L. REV. 393 (1970); Comment, *Parker v. Brown—Gone to Hecht: A New Test For State Action Exemptions,* 24 HASTINGS L.J. 287 (1973).

[98] Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 496 (E.D. Va. 1973).

The Supreme Court first articulated this exemption in *Parker v. Brown*.[101] The pertinent language from the opinion reads:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.[102]

The *Goldfarb* court's difficulty with the state-action exemption is understandable. In *Parker* the Supreme Court spoke in broad terms, without providing guidelines, as to how much state involvement is needed to bring the exemption into play. It has been noted that the absence of such standards has led some of the lower federal courts to recognize a state-action exemption when it should have been withheld.[103] Indeed, such may be the case with the *Goldfarb* decision.

The Supreme Court of Virginia is granted the authority to prescribe a code of ethics governing the professional conduct of attorneys.[104] The Virginia State Bar is, by statute, expressly designated as an agent of the court for the purpose of investigating and reporting violations of these ethical rules.[105] Pursuant to its authority as an agent of the court, the Virginia Bar has issued opinions which declare the habitual undercutting of the fee schedule to be unethical.[106] Such conduct may subject an attorney to a disciplinary proceeding before the courts.[107]

Because the Virginia State Bar is a statutory agent of the court for the regulation of attorneys, and because the courts provide an enforcement vehicle for disciplinary proceedings, the *Goldfarb* court apparently concluded that there was enough state involvement to bring the *Parker* exemption into play. However, the court disregarded another Virginia statute which places a significant limitation on the court's ability to adopt regulations governing the conduct of attorneys. That statute provides: "Notwithstanding the foregoing provisions of this article, the Supreme Court of Appeals shall not adopt or promulgate rules or regulations prescribing a code of ethics governing the professional conduct of attorneys at law, which shall be *inconsistent with any* statute . . . ."[108] While the legislature may not have had the antitrust laws specifically in mind when passing this statute, certainly the language is broad enough to include them. The *Goldfarb* court took note of this statute but considered it inapplicable because neither party asserted it.[109] It occurs to this writer that the court could have taken judicial notice of the statute even though neither party pled it.[110] It would therefore follow that any attempt by the state supreme court to adopt rules of conduct inconsistent with the Sherman Act is beyond the court's power. The court's activity in that respect should therefore not bring the state-action exemption into play.

---

[99] Post-trial Memorandum of defendant at 9-12, Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 498 (E.D. Va. 1973).

[100] Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 496 (E.D. Va. 1973). "Since the Fairfax Bar Association has selected its own course of conduct, the antitrust laws remain in full force and effect as to it." *Id.*

[101] 317 U.S. 341 (1943).

[102] *Id.* at 350-51.

[103] Comment, *supra* note 97, at 288.

[104] VA. CODE ANN. § 54-48 (1972 Repl. Vol.).

[105] VA. CODE ANN. §54-49 (1972 Repl. Vol.).

[106] Virginia State Bar, COMM. ON PROFESSIONAL ETHICS, OPINION NOS. 98 & 107.

[107] VA. CODE ANN. §54-73 (1972 Repl. Vol.).

It may well be that even in the absence of a statute limiting the court's rule-making power, the state-action exemption would have no application to the adoption and enforcement of a minimum fee schedule.

In the *Parker* opinion Justice Stone noted that ". . . a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it or by declaring that their action is lawful . . . ."[111] In light of such language one lower federal court has warned against the conclusion that action by any public official automatically confers exemption.[112] Another court has cautioned against a talismanic approach where scrupulous distinctions are called for.[113]

When at first blush state action appears to be involved, two inquiries should be made: Who is the real decision maker? and what degree of state supervision is involved?[114] One federal court has stated that the state involvement must be that of specific direction rather than general supervision.[115] The Supreme Court took an analogous stance in *Silver v. New York Stock Exchange.*[116]

---

[108] VA. CODE ANN. § 54-51 (1972 Repl. Vol.) (emphasis added).

[109] Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 496 n.4 (E.D. Va. 1973).

[110] C. MCCORMICK, EVIDENCE § 335, at 776-7 (2d ed. 1972).

[111] 317 U.S. 341, 351 (1943).

[112] George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 30 (1st Cir. 1970).

[113] Hecht v. Pro-Football, Inc., 444 F.2d 931, 934 (D.C. Cir. 1971).

[114] Comment, *supra* note 97, at 308.

[115] Marnell v. United Parcel Service of America, Inc., 260 F. Supp. 391, 409 (N.D. Cal. 1966).

[116] 373 U.S. 341 (1963). The issue in *Silver* involved the presence of federal rather than state action: Did the degree of control which the Securities Exchange Commission exercised over the stock exchanges serve to exempt them from the Sherman Act? The Court

It is submitted that when a bar association promulgates and enforces a minimum fee schedule, the real decisionmaking comes from the private sector and not official action. Subsequent supreme court approval of such activity constitutes a mere "rubber-stamping" of what is in fact private ratemaking. When, as in this case, nothing more than general supervision is involved, the *Parker v. Brown*[117] exemption should be withheld. The conclusion of the court in *Goldfarb* in this respect should be reconsidered.

III. IMPACT AND POSSIBLE SUBSTITUTES

Of course the full impact of the *Goldfarb* decision will not be felt until the appellate process is complete. Nevertheless, since the rendering of the district court opinion, a distinct trend toward rescission of minimum fee schedules is taking hold among certain local and state bar associations.[118] Indeed, it should be especially noted that the Mississippi State Bar has recently taken such action.[119]

It is submitted that the *Goldfarb* case is the first signal of an eventual complete downfall of fee schedules as they currently exist. For reasons herein discussed, the basic thrust and impact of the decision will not only survive appeal, but will probably be enhanced.[120] The state and local bar associations which still have a minimum fee schedule in force should follow the lead set by those enlightened bar associations which have already rescinded theirs.

For the bar associations which desire to provide their members with some idea of what constitutes a reasonable fee, there are certain substitutes which may survive antitrust attack.

One such fee-schedule substitute is the unit system, also known as the relative value scale.[121] The basic format of the system is that instead of assigning a specific dollar amount to a particular type of legal service, a unit value is chosen. The unit value is based on the time required and difficulty of a particular task in relation to all the other types of legal

---

noted that ". . . responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain [*sic*] with the exchanges themselves." *Id.* at 352. The Court therefore refused to grant an antitrust exemption.

[117] 317 U.S. 341 (1943).

[118] At least nine state bar associations have recently rescinded their fee schedule: Delaware, Florida, Georgia, Massachusetts, Michigan, Mississippi, Missouri, Tennessee, and Wisconsin. Also a number of local bar associations, including Atlanta, Cleveland, Philadelphia and Pittsburgh, have likewise abandoned their schedules.

[119] Resolution adopted by the Mississippi State Bar on June 9, 1973. *See* note 9 *supra*.

[120] The *Parker v. Brown* immunity granted to the state bars should and probably will be reversed.

[121] *See generally* Blaine, *A Relative Value Index For Lawyer's Services*, 53 ILL. B.J. 1006 (1965).

service. The attorney makes his own determination as to what is a fair hourly rate for his services. The hourly rate and the unit value of the service are then used in a formula to determine the ultimate monetary charge to the client. The Kansas Bar adopted such a relative value scale in 1967.[122] Other state bar associations are apparently leaning toward adoption of one.[123]

However, commentators have recognized that the relative value scale may also have antitrust implications.[124] Moreover, the Antitrust Division of the Justice Department has taken the express position that relative value scales constitute agreement upon an important element of price,[125] and therefore are vulnerable to antitrust attack.[126]

A second substitute which has been suggested is publication by the bar of an empirical survey which merely indicates the entire range of prices being charged throughout the state.[127] The basic purpose of the survey would be price dissemination. There would be no element of agreement which could affect price structure. While the exchange of price information concerning specific sales to identified customers has been declared a violation of the Sherman Act,[128] the Supreme Court has held that non-specific pricing surveys are legitimate price-dissemination tools.[129]

A third proposed fee-schedule substitute is the bar sponsorship of lectures throughout the state wherein attorneys are advised of the various methods of evaluating their services.[130] While such a program may be somewhat cumbersome, it nevertheless has been expressly condoned by the Antitrust Division.[131]

In summary, there are viable substitutes for minimum fee schedules. It is submitted that bar publication of an empirical survey of prices constitutes the most reasoned approach to the problem. Such surveys have already been sanctioned by the Supreme Court. On the other hand, relative value scales are, at the least, suspect and probably will eventually be subjected to antitrust attack. Furthermore, bar sponsorship of pricing lectures would probably prove too cumbersome to be effectively implemented.

---

[122] ABA Standing Comm. on the Economics of Practice, Minimum Fee Schedules, Appendix A, at 31 (1970).

[123] A committee of the Florida Bar Association recently recommended that a relative value scale be adopted by that association. *See* Note, 47 **Fla.** B.J. 381 (1973).

[124] Blaine, *supra* note 121, at 1011.

[125] Address by Mr. Lewis Bernstein, Chief, Special Litigation Section, Antitrust Division before the National Conference of Bar Presidents (August 4, 1973).

[126] A complete antitrust analysis of the relative value scale is not within the ambit of this paper; but it is important to note that they are suspect.

[127] Note, *supra* note 3, at 987.

[128] United States v. Container Corp. of America, 393 U.S. 333 (1969).

[129] Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925).

[130] Address by Mr. Lewis Bernstein, *supra* note 125.

[131] *Id.*

K. Douglas Barfield

NO-FAULT DIVORCE: A PROPOSAL FOR MISSISSIPPI

I. Introduction

The two questions which are to be answered by this comment are: (1) whether there is a need for reform of our divorce laws; and, providing the answer is affirmative, (2) whether the new no-fault concept is the type of reform needed. Our present divorce laws are grounded on the "fault" concept, whereby one spouse has to prove the misconduct of the other spouse in order to obtain a divorce.[1] This concept is also found in the collateral issues of alimony, property settlement, and child custody. One purpose of this comment is to show how the element of fault distracts from the real issues in these cases, thus producing court decisions that fail to reach the real conflicts of the parties. The role which "fault" plays in this area is being completely eliminated or drastically curtailed by some states. This is accomplished by the implementation of a no-fault or "marital break-down" approach.[2] Like any other reform, this new concept is subject to criticism. Therefore, another purpose of this comment will be to look at the no-fault concept to determine if the criticism is justified. However, the main purpose of this comment is to show that there is a need for reform of our divorce laws and to answer the question as to what form the needed change should take. It is hoped that the points brought out herein are sufficient to aid one in understanding why the answer to this question is found in the no-fault concept of divorce.

II. A Critical Overview

Critics of divorce proclaim that there are too many divorces in our society today. As a result, they feel the foundations of our family life are crumbling.[3] These attitudes have evolved because of religious attitudes, sentiment, logic, and historical accident.[4] As a result of this criticism, some states have made valiant attempts to reform their divorce laws. The rationale behind this effort is that today's antiquated divorce laws have little relevancy in our modern society.[5] These reforms are an attempt to create harmony between the divorce laws and the more modern attitudes of contemporary society.[6] In the society in which we live, divorce has become less of an object of social stigma and more of a necessary and desirable solution.[7] Unfortunately, this attitude has not been reflected in the divorce laws of many states, including Mississippi.[8] This imbalance between the social and legal development has forced many people to perjure themselves, or fake or commit actual acts of adultery to obtain a divorce.[9] Unlike some, the Mississippi Legislature has ignored this problem and has refused to balance the scales so that our legal institutions reflect our social attitudes on divorce. Several proposals have been made to alleviate these problems, but the proposal attracting the most attention makes marital breakdown the judicial criterion for granting divorce.[10]

---

[1] *See, e.g.*, Burnett v. Burnett, 271 So. 2d 90 (Miss. 1972); Price v. Price, 202 Miss. 268, 32 So. 2d 124 (1947).

[2] Marital breakdown occurs when the marital relationship has deteriorated to a state of disharmony without either party being specifically at fault.

[3] Clark, *Divorce Policy and Divorce Reform*, 42 U. Colo. L. Rev. 403 (1971) [hereinafter cited as Clark].

[4] *See* Note, *Exclusion of Fault in Divorce Law*, 45 Nw. U.L. Rev. 399, 401 (1950).

[5] Note, *No Fault Divorce: A Time for Change?*, 7 Suff. U.L. Rev. 86 (1972) [hereinafter cited as *No Fault Divorce*].

Divorce is a three-party proceeding involving both spouses and the state.[11] The state's interest in divorce involves three principal aims: "(1) proper care and training of children; (2) maintenance of stable sexual relations; and (3) preservation of the overall integrity of [the] marriage."[12] To determine whether these aims are met, the existing divorce laws must be applied to each goal.

It is unquestioned that children raised in a home broken by divorce have a more difficult life than those children raised in a well-adjusted marriage.[13] However, in some cases, "our courts have denied a divorce to the parents, often leaving the parents and children in a strained environment."[14] The question then arises as to "whether the proper care and raising of children is better attained in a conflicted home or in a broken home."[15] It has been proven by research that "children in conflicted homes suffer more than children in divorced homes."[16] Thus one can see where our present divorce law fails to meet the goal of proper care and training of children.

---

[6] *See* Note, *Marital Fault v. Irremediable Breakdown: The New York Problem and the California Solution*, 16 N.Y.L.F. 119, 124 (1970).

[7] Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966) [hereinafter cited as Wadlington].

[8] In Mississippi there have been no changes in the fault oriented divorce laws for the past 70 to 80 years, except for the addition of "specific grounds."

It is suggested that the two primary problems of existing divorce laws are: (1) the concept that the fault oriented approach is best, and (2) the philosophy that strict divorce laws are necessary to promote the stability of the marital relationship. *No Fault Divorce, supra* note 5.

[9] Wadlington, *supra* note 7.

[10] *See* Note, *Trends in Divorce Reform: Mitigation of the Fault Concept*, 19 DR. L. REV. 139, 152 (1969) [hereinafter cited as *Trends in Divorce Reform*]. A more thorough discussion on this proposal will be made later in this paper.

[11] *See* Zwerg v. Zwerg, 254 Miss. 8, 179 So. 2d 821, 824 (1965).

[12] *No Fault Divorce, supra* note 5, at 99.

[13] *Id.* at 100.

[14] *See, e.g.,* Stribling v. Stribling, 215 So. 2d 869 (Miss. 1968); Howard v. Howard, 243 Miss. 301, 138 So. 2d 292 (1962).

[15] *No Fault Divorce, supra* note 5, at 100.

The goal of maintaining stable sexual relations is also frustrated by our present divorce laws. This is because our present divorce laws may promote adultery or other acts of sexual misconduct. "If parents have separated and there is no reasonable prospect of their getting together again, it is very likely (people being the way they are) that one or the other partner will find a new mate—even without benefit of divorce."[17] Affirmative defenses to divorce actions also frustrate this goal.[18]

Finally, the goal of preservation of the overall integrity of the marriage is frustrated by present divorce laws. It is apparent that if our laws fail to achieve the first two goals, then there is little possibility that they are sufficient to achieve the third. The first two objectives are interrelated with the overall integrity of the marriage and when they are not met, there seems to be very little integrity left to preserve. The harsh reality of this is that only the state can grant or deny a divorce.[19] When the divorce is denied, the state does not, "by some official magic," put the marriage back together again.[20]

With the ultimate goal being the achievement of the three objectives listed above, the legislature should look to five basic principles in developing a good divorce law:

> (1) The statute must seek to preserve viable marriages but, where a marriage has broken down beyond repair, the statute should enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation and with justice to the parties to the marriage and their children.
> (2) The statute must respect the privacy and integrity of the marriage relationship and all the individuals involved.
> (3) The statute should protect the interests of the children and protect the spouses from rash, impulsive and coerced decisions.
> (4) The procedure must encourage a spirit of cooperation and good

---

[16] Bernard, *No News, But New Ideas*, DIVORCE AND AFTER 10 (P. Bohannan ed. 1970). Under our present divorce laws if the parties want a divorce but are unable to prove one of the established grounds, then the courts will deny them the requested divorce. This is surely more damaging to a child than it would be to allow his parents to go their separate ways and possibly establish a new home with a better environment than that existing in the old. *See, e.g.,* Howard v. Howard, 231 Miss. 301, 138 So. 2d 292 (1962).

[17] *See* R. DEWOLF, THE BONDS OF ACRIMONY 70 (1970).

[18] *E.g.,* the defense of condonation where there has been cohabitation would seem not only to discourage reconciliation, but also to discourage resumption of normal sexual relations between the spouses.

[19] *Trends in Divorce Reform, supra* note 10, at 141.

[20] *Id.*

> faith efforts to resolve the difficult issues of finances and custody and not exacerbate the tensions and hostile emotions that inevitably accompany the breakup of a marriage.
>
> (5) The statute should protect the integrity of the bar and the judicial system and encourage respect for the law.[21]

The main question to consider while studying these principles is, what is the factor which prohibits our present divorce law from achieving the three objectives listed earlier. The answer will probably be found in the "fault concept" which exists in our present law.

III. FAULT CONCEPT IN DIVORCE

A. *Divorce Proceedings*

The basic criticism of present divorce laws is that they are based upon the concept of fault. In Mississippi, and many other states, grounds for divorce require that fault, blame, or guilt be placed on one of the parties before a divorce can be granted.[22] This fault concept overlooks the fact that marriage consists of highly complex needs and interrelationships which, when unfulfilled or disturbed, might best be served by divorce.[23]

The necessity of putting the blame or fault on one party produces an adversary proceeding whereby the plaintiff has to plead and prove the defendant guilty of marital misconduct upon which a divorce can be granted.[24] Many people believe this adversary process subjects the parties to humiliation, hypocrisy, perjury, and needless hostility when they have to testify to a prescribed ground for divorce.[25] In most cases, prior to divorce proceedings the parties have already reached an impasse. The reason they have finally come to the courts is that they feel their differences are such that only a court of law can resolve them.[26]

---

[21] Family Law Committee of the Connecticut Bar Association, *Proposal for Revision of the Connecticut Statutes Relative to Divorce: Statute and Commentary*, 44 CONN. B.J. 411, 416 (1970) [hereinafter cited as Family Law Committee]. These principles were adopted by a Family Law Committee in Connecticut which was studying the need for divorce reform in that state.

[22] *See, e.g.*, Note, *A Comparative Approach: The Divergent Paths of English and American Divorce Reform—To Take The Step From Fault to Breakdown?*, 22 U. FLA. L. REV. 101, 121 (1969).

[23] Couch, *Toward a More Realistic Divorce Law*, 43 TUL. L. REV. 243, 255 (1969).

[24] *Trends in Divorce Reform*, *supra* note 10, at 139.

[25] *See, e.g.*, Cannell, *Abolish Fault-Oriented Divorce In Ohio—As A Service to Society and To Restore To Dignity The Domestic Relations Courts*, 4 AKRON L. REV. 92, 93 (1971) [hereinafter cited as Cannell]; Clark, *supra* note 3, at 407.

[26] *See* Comment, *Alimony, Property Settlement and Child Custody Under the New Divorce Statutes: No-Fault is Not Enough*, 22 CATH. U.L. REV. 365, 366 (1973) [hereinafter cited as *No-Fault is Not Enough*].

However, under the fault system they must go through the process of proving guilt or innocence[27] and many times this produces even greater antagonism.[28] Moreover, this process of proving fault, when, as in many cases, the marriage has failed without either party being at fault, can produce greater psychological trauma than was initially felt and will often prevent any possibility of reconciliation.[29]

In most divorces, the cause of the marital breakdown has little relation to the fault alleged.[30] The actual reasons most often advanced for the breakdown are: "emotional immaturity, the romantic concept of marriage, personality differences, irresponsibility, mother-in-law trouble, drunkenness, social mobility, urban anonymity, the decline of religious influences, industrialization, [and] financial difficulties. . . ."[31] However, in Mississippi these factors will not be considered by the courts in granting a divorce.[32] Instead, the parties must allege reasons which, in most instances, are not the basic cause of the marital failure.[33] With this in mind it would seem that when the parties to a marriage have decided they no longer can live together, fault should not be a relevant consideration in granting this wish,[34] because the marital relationship is, in fact, dead.[35] In instances such as this, public policy would be better served if the courts would free the unhappy and unsatisfied spouses from their broken marriage.[36] Unfortunately, unless the parties can establish one of the required "fault" grounds for a divorce, the courts, governed by statutory requirements, must compel the parties to remain married.[37]

---

[27] This is unrealistic when one considers that divorce litigation is perhaps the one exception to the general rule that there must be a real contest for the courts to decide. Sayre, *Divorce for the Unworthy: Specific Grounds for Divorce*, 18 Law & Contemp. Prob. 26, 27 (1953).

[28] *See, e.g.,* Goddard, *A Report on California's New Divorce Law: Progress and Problems*, 6 Fam. L.Q. 405, 407 (1972).

[29] Comment, *Oregon's No-Fault Marriage Dissolution Act*, 51 Ore. L. Rev. 715, 717 (1972) [hereinafter cited as *Oregon's No-Fault Act*].

[30] *See, e.g., No Fault Divorce, supra* note 5, at 86.

[31] Freed & Foster, *Divorce American Style*, 883 Annals 71, 85 (1969).

[32] The one exception to this is divorce for habitual drunkenness. Miss. Code Ann. § 93-5-1 (1972), *formerly* Miss. Code Ann. § 2735 (1957).

[33] *See* Clark, *supra* note 3, at 405, wherein it is suggested that the grounds alleged by the parties are symptoms of marital failure or are pretexts used to escape from the problems of the marriage.

[34] *See, e.g.,* Baer & Davis, *"Merit" in No Fault Divorce*, 60 Ill. B.J. 766, 767 (1972) [hereinafter cited as Baer & Davis]; Wolf, *The Divorce Reform Law—A Lesson in Legislative Oversight*, 22 Buff. L. Rev. 173, 180 (1972).

[35] Honigman, *What "No-Fault" Means To Divorce*, 51 Mich. St. B.J. 16, 17 (1972) [hereinafter cited as Honigman].

[36] *Trends in Divorce Reform, supra* note 10, at 141.

[37] *See, e.g.,* Burnett v. Burnett, 271 So. 2d 90 (Miss. 1973); Criswell v. Criswell, 254

These rigid statutory rules, which the courts must follow, are attempts by the state to preserve the marriage.[38] But, should the state attempt to preserve a marriage through legal controls when, in fact, the parties themselves have not been able to save it?[39] A system, such as Mississippi's, which in fact follows this pattern,[40] undermines the public's respect for our legal system.[41]

As was stated earlier, the state has an interest in preserving the integrity of the marriage. However, in examining the fault system, one realizes that there is very little evidence that our present law, which requires one party to be guilty and the other innocent, contributes to preserving this integrity.[42] In fact, it can be suggested that the present fault system promotes additional social ills when it forces two unhappy people to remain married. When parties to a marriage are forced to remain married, it is possible that one or both of the parties will turn to alcohol, personal indignities, or extramarital sexual gratification.[43] In addition, the present system may force some people to commit a fraud upon the court or try to obtain a costly migratory divorce.[44] The fact that the parties may resort to illicit relationships or fraud is a grave danger to public morality; an even greater danger than making divorce easier to obtain.[45]

While these are perhaps the most serious results of the fault concept, there is yet another aspect which should be considered; that is, strictly enforced fault grounds may cause economic discrimination or economic waste.[46] Since the poor can not afford the time lost from work, cost of travel to another state, or the court costs, and the more affluent

---

Miss. 8, 182 So. 2d 587 (1966); Howard v. Howard, 243 Miss. 301, 138 So. 2d 292 (1962); Nichols v. Nichols, 197 Miss. 410, 20 So. 2d 72 (1944); Cannell, *supra* note 25, at 94.

[38] *See generally No Fault Divorce*, *supra* note 5.

[39] Note, *A Divorce Reform Act*, 5 HARV. J. LEGIS. 563, 567 (1968); *see, e.g.*, Cannell, *supra* note 25, at 105.

[40] *See* note 37 *supra*.

[41] *See* Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 U.C.L.A.L. REV. 1306, 1312 (1970).

[42] Baer & Davis, *supra* note 34, at 767-68.

[43] Wadlington, *supra* note 7, at 83. Because these problems constitute grounds for divorce in many states, including Mississippi, MISS. CODE ANN. § 93-5-3 (1972), *formerly* MISS. CODE ANN. § 2735 (1957), the end result could be the same as if the divorce had been granted initially.

[44] Goldstein & Gitter, *On Abolition of Grounds for Divorce: A Model Statute & Commentary*, 3 FAM. L.Q. 75, 80 (1969) [hereinafter cited as Goldstein & Gitter]. An example of a migratory divorce is when one or both spouses travel from their home state to a foreign state in order to obtain a divorce.

[45] *See, e.g.*, Note, *Recrimination As A Bar To Divorce: Mitigating the Mandate*, 51 IOWA L. REV. 184, 197 (1965).

[46] *See A Divorce Reform Act*, *supra* note 39, at 570.

can, our present divorce laws favor the latter.[47] Economic waste occurs when money is spent for trips to other states for a divorce which could not be granted in the home state.

These criticisms are perhaps the ones which attract the most attention. There are other criticisms but they are generally considered to be minor.[48]

The purpose which the issue of fault serves in a divorce case is not entirely clear, since it is the belief of many people that fault has no relevancy to the breakdown of a marriage.[49] Certainly, the three principal aims of any divorce law (as set out above) are not achieved when fault is the criterion for divorce. The purpose of the issue of fault in a divorce case is even less obvious when one considers the premise that divorce is merely a "legal stamp" which memorializes that which is already dead.[50]

If fault is not the real issue in a divorce case, then what is? In most cases the real issues are alimony, property settlement, and child custody.[51] Yet, these issues do not receive the attention they deserve because, in most states, the issue of fault drowns them out.[52]

---

[47] *Id.*

[48] These criticisms are:

(1) The fault concept rewards sin and punishes virtue. *See, e.g.,* Tenny, *Divorce Without Fault: The Next Step*, 46 Neb. L. Rev. 24, 33 (1967) [hereinafter cited as Tenny]; Henderson, *Practice and Problems Under Nebraska's New Divorce Laws*, 52 Neb. L. Rev. 1, 16 (1972) [hereinafter cited as Henderson].

(2) Laws based on fault fail to recognize that seldom are there clear-cut lines of guilt or innocence in a bad marriage. Baer & Davis, *supra* note 34, at 767.

(3) Fault laws fail to provide equitable treatment to all persons who require divorce, regardless of socio-economic status. McHugh, *No-Fault Divorce Laws: An Overview and Critique*, 32 The Jurist 266, 267 (1972).

(4) The fault concept does not aid the courts in making judgments in matters that are highly emotional. *See generally* Bodenheimer, *The Multiplicity of Child Custody Proceedings—Problems of California Law*, 23 Stan. L. Rev. 703 (1971).

(5) The requirement of proving fault is an invasion of privacy. *See* Family Law Committee, *supra* note 21, at 413.

(6) The present divorce laws are hypocritical because although a divorce cannot be granted until fault is proven, after the fault grounds are agreed upon prior to the trial, the trial is uncontested. *See* Baer & Davis, *supra* note 34, at 767.

(6) In order for one to prove fault he often has to reveal to the court and the public intimate and personal details of the marriage. *See, e.g.,* Sarphie v. Sarphie, 180 Miss. 313, 177 So. 358 (1937).

[49] Some people argue that "fault" is necessary to protect an innocent spouse or is necessary to help the court determine the issues of alimony and child custody. These arguments are weak as is shown. *See* note 177 and accompanying text *infra*.

[50] *See* Honigman, *supra* note 35, at 17, wherein it is suggested that to deny this legal stamp is a sentence of a lifetime of misery without reprieve for the parties.

[51] *No-Fault Is Not Enough*, *supra* note 26, at 367.

[52] *Id.*

B. Alimony and Property Settlement

Alimony and property settlement, which basically serve the same purpose, are unfortunately awarded upon a determination of fault by either party.[53] The concept of alimony originated in a much different society than that in which we live today.[54] In contemporary society more women are working and therefore able to support themselves without the help of a husband.[55] However, our laws respecting alimony awards do not reflect societal changes. Alimony awards are still based upon the premise that it is the husband's duty to support the wife, even after the marriage has been dissolved.[56] In many instances it may be necessary that alimony be granted, but because the courts generally have complete discretion as to the granting of alimony, there has been a tendency to grant alimony on criteria other than pure need.[57] The courts, however, should not suffer the entire brunt of this criticism. Most statutes concerning alimony,[58] including the Mississippi statute,[59] fail to set up specific guidelines upon which alimony or property settlements should be granted. Because of this, the courts have considered fault to be one of the factors in determining alimony and property settlements.[60]

The use of fault in determining alimony or property awards has drawn much criticism for various reasons. First, it is argued that it compensates the party injured in a divorce and penalizes the party at fault.[61] An opposing view, however, is that if fault is eliminated when determining alimony and property settlements, the result may be that the deserving are penalized and the unworthy are unjustly enriched.[62] However, this writer contends that the more equitable system would only allow fault to be considered in order to prevent the spouse at fault (assuming there is, in fact, fault) from obtaining alimony from an innocent spouse. In all other cases, fault should not be considered at all. Even though the courts have attempted to set forth some adequate standards,[63] they continue to consider fault in the decision to grant alimony. Perhaps the only way to restrict fault as a determinant is through legislative action.[64] Should legislation restrict fault as a consideration, any economic division would be free of judicial prejudice[65] and reflective of the actual needs of the parties.

---

[53] *See, e.g., No-Fault Is Not Enough, supra* note 26, at 368, 374.

[54] *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS § 14.1 (1968). In earlier years it was believed that women were burdens upon society unless they were married and supported by a husband.

[55] *See, e.g.,* Rose, *Non-Fault Divorce in Ohio*, 31 OHIO ST. L.J. 52, 53 (1970).

[56] *See* Owens v. Owens, 234 Miss. 261, 106 So. 2d 59 (1958); Felder v. Felder's Estate, 195 Miss. 326, 13 So. 2d 823 (1943); J. BUNKLEY & W. MORSE, DIVORCE AND SEPARATION IN MISSISSIPPI § 6.00 (1957).

[57] *See, e.g., No-Fault is Not Enough, supra* note 26, at 368.

[58] *See, e.g.,* MINN. STAT. ANN. § 518.55 (Supp. 1973); OKLA. STAT. ANN. § 1278 (1961).

[59] See MISS. CODE ANN. § 93-5-23 (1972), *formerly* MISS. CODE ANN. § 2743 (1957).

[60] Clark, *supra* note 3, at 409; *see, e.g.,* King v. King, 246 Miss. 798, 152 So. 2d 889 (1963).

[61] Baer & Davis, *supra* note 34, at 771.

[62] *Id.* at 772.

Secondly, the need to prove fault may lead to economic "blackmail."[66] This occurs when one spouse desires a divorce, but is unable to obtain one because the other spouse refuses to assert the required grounds. The "key" to the spouse's release may be a substantial economic settlement.[67] Allowance of alimony under these circumstances can be considered a punitive fine which is completely illogical from a sociological and legal standpoint.[68]

If alimony were based upon economic factors and not just the concept that it is a husband's duty to support his wife or that a husband should pay for his misconduct, then these problems would be alleviated.[69]

C. Child Custody

The issue of child custody, in a divorce proceeding, is perhaps the hardest issue for the court to handle.[70] At common law, the father was given the paramount right of custody of the children.[71] Today, however, this rule is no longer followed in Mississippi,[72] nor in most of the other states.[73] Today, the issue of child custody is usually determined by the "best interest rule."[74] A number of factors are applied in determining the best interest of the child.[75] Most of these factors have been established by the courts since few statutes set up any specific guidelines for awarding custody.[76] The problem is that, while the courts may set forth certain factors to determine the best interest of the child, they also consider the fault of one or both parents when determining which parent should have custody of the child.[77] In cases where the court considers the fault of one of the parents, it may consciously or unconsciously award custody to the innocent spouse. This, in effect, punishes the guilty spouse and may disregard the best interest of the child.[78] It can not be said that fault should never be used in determining child custody. However, since the dispute in a child custody suit is only minutely concerned with what happened in the past, the consideration of fault should be carefully guarded.[79] The custody suit is actually concerned with a prediction of the future and thus any consideration of fault should be only that which would affect the child's best interest.[80] In order to effectuate this purpose and eliminate as much judicial prejudice as possible, some states have established specific guidelines restricting fault as a consideration.[81]

---

[63] *See, e.g.*, Martin v. Martin, 271 So. 2d 391 (Miss. 1972); Brabham v. Brabham, 226 Miss. 391, 84 So. 2d 147 (1955).

[64] *See, e.g.*, *No Fault Divorce*, *supra* note 5, at 105; Wadlington, *supra* note 7, at 52.

[65] Some judges may give more alimony to the wife where the husband has committed adultery because the act of adultery is personally revolting. But, if this factor could not be brought out at the hearing, and the judge could only consider the fact of marital breakdown, then personal prejudice would not, subconsciously, influence his decision. *See, e.g.*, Clark, *supra* note 3, at 411.

[66] Honigman, *supra* note 35, at 17. *See* Hopson, *The Economics of A Divorce: A Pilot Empirical Study at the Trial Court Level*, 11 U. KAN. L. REV. 107, 127 (1962).

[67] Honigman, *supra* note 35, at 17.

[68] *No-Fault is Not Enough*, *supra* note 26, at 369; *see, e.g.*, Couch, *supra* note 23, at 258.

[69] In most states alimony is granted only to the wife, unless there is specific statutory authority providing otherwise. Annot., 66 A.L.R.2d 880, 882 (1959). *Contra*, ALASKA STAT. § 09.55.210 (1973); ILL. ANN. STAT. ch. 40, § 19 (Smith-Hurd 1956); MASS. ANN. LAWS ch. 208, § 34 (1958); WASH. REV. CODE ANN. § 26.08.110 (1961); H. CLARK, THE LAW OF DOMESTIC RELATIONS § 14.6 (1968). Mississippi does not have such a statute and, based upon past court decisions, it is probably safe to assume that the courts will not grant alimony to a husband, unless the legislature specifically allows it.

[70] *See, e.g.*, Bodenheimer, *supra* note 48, at 726; *No-Fault Is Not Enough*, *supra* note 26, at 377. Judges can juggle figures concerning alimony and property awards until they balance. When a child's future is at stake the judge has to consider emotional factors which can not be determined with pen and paper.

[71] J. BUNKLEY & W. MORSE, *supra* note 56, at § 8.02.

---

[72] *See* MISS. CODE ANN. § 93-13-1 (1972), *formerly* MISS. CODE ANN. § 399 (1957), which states: "The father and mother shall have equal powers and rights, and neither parent has any right paramount to the right of the other concerning the custody of the minor. . . ."

[73] *See, e.g.*, Podell, Peck, & First, *Custody—To Which Parent*, 56 MARQ. L. REV. 51, 52 (1972).

[74] J. BUNKLEY & W. MORSE, *supra* note 56, at § 8.01. This rule requires that the child ". . . be physically well cared for, . . . properly trained, mentally and morally, to discharge the duties . . . of citizenship." *Id.* § 8.03. *See, e.g.*, McIntosh v. Meyer, 243 Miss. 596, 139 So. 2d 368 (1962).

[75] *See, e.g., No-Fault Is Not Enough, supra* note 26, at 379, wherein the following factors are set forth:

(1) The moral fitness of the competing parties;
(2) The comparative physical environments offered;
(3) The emotional ties of the child to the parties and of the parties to the child;
(4) The age, sex, and health of the child; and
(5) The articulated preference of the child.

Mississippi cases which discuss these factors are: Drew v. Drew, 249 Miss. 26, 162 So. 2d 652 (1964) (physical environment); Kyzar v. Kyzar, 248 Miss. 59, 157 So. 2d 770 (1963) (age); Latham v. Latham, 223 Miss. 263, 78 So. 2d 147 (1955) (preference).

[76] *See, e.g.*, MISS. CODE ANN. § 93-5-23 (1972), *formerly* MISS. CODE ANN. § 2743 (1957), which states: "[T]he court may, in its discretion, . . . make all orders touching the care, custody and maintenance of the children . . . ." *But see* MISS. CODE ANN. § 93-11-65 (1972), *formerly* MISS. CODE ANN. § 1263.5 (Supp. 1972), wherein certain conditions have been attached to this rule. *See also* Bassett v. Simms, 220 Miss. 210, 70 So. 2d 530 (1954) (moral fitness); Winfield v. Winfield, 203 Miss. 391, 35 So. 2d 443 (1948) (moral fitness).

[77] *See, e.g.*, Winfield v. Winfield, 203 Miss. 391, 35 So. 2d 443 (1948); Hulett v. Hulett, 152 Miss. 476, 119 So. 581 (1928); Duncan v. Duncan, 119 Miss. 271, 80 So. 697 (1919).

[78] Clark, *supra* note 3, at 412; *Oregon's No-Fault Act, supra* note 29, at 724.

[79] Clark, *supra* note 3, at 413.

In Mississippi either parent may have custody, as long as the child's best interest is served.[82] However, the Mississippi statute and court decisions still allow fault to be a primary consideration in the determination of the custody of the child.[83]

IV. The No-Fault Concept

A. *In General*

Some states which have recognized the problems inherent in the present divorce laws have pursued one of two possible courses: (1) enact a complete set of new laws, or (2) add new ideas to the old laws.[84] In either case, the reforms have generally encompassed one or more of several proposals:

> (1) Eliminate all divorce grounds and allow unqualified unilateral divorce or divorce by mutual consent.
> (2) Eliminate all divorce grounds and make marital breakdown the judicial criterion for granting divorce.
> (3) Make marital breakdown an additional ground for divorce.
> (4) Make non-fault separation the sole ground for divorce.
> (5) Make non-fault separation an additional ground for divorce.
> (6) Make non-fault incompatibility an additional ground for divorce.[85]

Although any one of these concepts may alleviate the problems of present divorce laws, the proposal that is attracting the most attention today is the second. This proposal is more commonly known as the "no-fault concept" because it eliminates, in most statutes, any consideration of fault in granting divorces, alimony, property settlements, and child custody.[86] However, since all of the above proposals eliminate fault to some extent, it might be beneficial to first examine their merits and demerits, before looking at the no-fault concept.

---

[80] *See* J. Bunkley & W. Morse, *supra* note 56, at § 8.03, in which it is stated that only ". . . the actual present character, conduct and associations as well as the reasonable probabilities for the future, . . ." should be considered. *Id.*

[81] *See, e.g.*, Colo. Rev. Stat. Ann. § 46-1-24(2) (Supp. 1971); Ky. Rev. Stat. § 403.270(2) (1972).

[82] There may be one exception here. If the child is of a tender age the mother will perhaps be preferred. J. Bunkley & W. Morse, *supra* note 56, at § 8.05.

[83] *See, e.g.*, Anderson v. Watkins, 208 So. 2d 573 (Miss. 1968); Winfield v. Winfield, 203 Miss. 391, 35 So. 2d 443 (1948).

[84] *Compare* the new Kentucky statutes on divorce *with* the Alabama statutes on divorce. Ky. Rev. Stat. § 403.010 to 403.350 (1972); Ala. Code tit. 34, § 20(9) (Supp. 1971).

[85] *Trends in Divorce Reform*, *supra* note 10, at 152.

1. Unqualified Unilateral Divorce or Divorce by Mutual Consent

These are perhaps the most liberal proposals.[87] It is unlikely that they will be adopted by any jurisdiction[88] because the state supposedly has a very profound interest in the marital relationship.[89] These proposals purport to allow either spouse to file an application for divorce and then, at the end of a 1-year "cooling off" period file a petition for a decree of divorce.[90] Under them there are no specified grounds for divorce and there is no judicial inquiry as to the propriety of the divorce.[91] This is probably why such a proposal has not been adopted or even strongly advocated.[92] Finally, the possibility that such a liberal system would cause the parties to make impromptu decisions about divorce makes these proposals highly suspect since it would make divorce "too easy" to obtain.[93]

2. Separation as Sole Ground or Additional Ground for Divorce

At the present time there are no states which have a "living separate and apart" statute as the sole ground for divorce.[94] Under this proposal the parties would live separate and apart for a specified period of time.[95] After this time, either a bilateral divorce[96] or unilateral divorce[97] would be granted. The only role the judge would assume in either type of divorce is that of an advisor.[98]

---

[86] *See, e.g.*, CAL. CIV. CODE § 4506 *et seq.* (West 1970); COLO REV. STAT. ANN. § 46-1-1 *et seq.* (Supp. 1971); KY. REV. STAT. § 403.110 *et seq.* (1972).

[87] For a more thorough discussion on this proposal see Goldstein & Gitter, *supra* note 44.

[88] *See, e.g.*, Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAM. L. 179, 193 (1968) [hereinafter cited as *Grounds for Divorce*].

[89] *See, e.g.*, Zwerg v. Zwerg, 254 Miss. 8, 179 So. 2d 821 (1965).

[90] Goldstein & Gitter, *supra* note 44, at 89.

[91] *Trends in Divorce Reform, supra* note 10, at 153.

[92] *See Grounds for Divorce, supra* note 88, at 193.

[93] *Trends in Divorce Reform, supra* note 10, at 160-61.

[94] For a more thorough discussion of this proposal *see Grounds for Divorce, supra* note 88, at 211-18.

[95] The guiding principle here is that divorce is granted upon proof of the marital breakdown and the fact that the parties lived separate and apart for the required period is one factor which helps establish the marital breakdown. *Trends in Divorce Reform, supra* note 10, at 159.

[96] A "bilateral divorce" is "[a] divorce [that] would be granted after a one-year period of separation if [the] husband and wife appear in court at the beginning and at the end of the period and declare that their marriage had broken down and that reconcilia-

Separation as an additional ground has been adopted by many states[99] and in various forms. Here again the parties live apart for a specified time and then are granted a divorce. The divorce may be bilateral or unilateral, depending on each state's requirements. The "living apart" statutes which are in effect today can be broken down into five categories,[100] and their basic purpose is to eliminate the element

---

tion efforts were unsuccessful or would be of no avail." *Grounds for Divorce, supra* note 88, at 212.

[97] A "unilateral divorce" is "[a] divorce [that] would be granted after two years of separation if one spouse appears in court at the beginning and end of the period and makes declarations similar to those described in [note 96 *supra*]. The other spouse, if available would be required to appear." *Id.*

[98] He is "limited basically to informing the parties about the advisability and availability of counseling opportunities on a short-term basis by the court staff." *Trends in Divorce Reform, supra* note 10, at 160.

[99] ARIZ. REV. STAT. ANN. § 25-312(7) (1956); ARK. STAT. ANN. § 34-1202(7) (Supp. 1969); DEL. CODE ANN. tit. 13, § 1522(11) (Supp. 1970); D.C. CODE ANN. § 16-904(a) (1966); HAWAII REV. STAT. § 580-41 (11) (1968); IDAHO CODE § 32-610 (1963); MD. ANN. CODE art. 16, § 24(5) (1973); NEV. REV. STAT. § 125.010(9) (1967); N.J. REV. STAT. § 2A:34-2(d) (Supp. 1973); N.Y. DOM. REL. LAW § 170 (McKinney 1973); N.C. GEN. LAWS ANN. § 50-5(4) (1966); R.I. GEN. LAWS ANN. § 15-5-3 (Supp. 1972); S.C. CODE ANN. § 20-101(5) (Supp. 1971); TEX. FAM. CODE ANN. § 3.06 (1971); UTAH CODE ANN. § 30-3-1(8) (1969); VT. STAT. ANN. tit. 15, § 551(7) (Supp. 1971); VA. CODE ANN. § 20-91(9) (Supp. 1973); WASH. REV. CODE § 26.08.020(9) (Supp. 1972); W. VA. CODE § 48-2-4(7) (Supp. 1973); WIS. STAT. ANN. § 247.07(6) (Supp. 1973); WYO. STAT. ANN. § 20-47 (1959). For a more thorough discussion of this proposal *see* Wadlington, *supra* note 7, at 52-81; Note, *Voluntary Separation as Grounds for Divorce in Wisconsin*, 1972 WIS. L. REV. 1215.

[100] The five categories are:

> (1) The Enoch Arden statutes, which are designed for application in the limited situation in which one spouse disappears and is presumed to be dead.
>
> (2) Statutes which provide that after the spouses have lived apart for a specified time period without reconciliation pursuant to a decree of legal separation or limited divorce, the courts will grant an absolute divorce at the suit of either spouse without regard to fault.
>
> (3) Voluntary separation statutes, which permit the spouses to agree to separate in order to later obtain a divorce based on the separation after the requisite time period has elapsed without a manifested "change of heart" by either.
>
> (4) Statutes which permit the granting of a divorce because the parties have lived separate and apart for a given period, but which make the action available only to the partner who was not at fault in causing the separation.
>
> (5) Statutes which make the fact of having lived separate and apart following a breakdown of the marriage the basis for divorce regardless of whether the parties agreed to separate and even thought the "fault" of one of the spouses may have contributed or directly led to the separation.

For a thorough discussion of each category and a list of the states which are in the various categories see Wadlington, *supra* note 7, at 52-68.

of fault as a consideration for granting the divorce.[101] However, when separation is an additional ground it is possible that fault will continue to be considered by the courts, since it may play a role in any of the other grounds.[102] Some other general observations of the separation proposals are:

> (1) If the separation ground is added to existing grounds, the existing grounds will become useless.[103]
> (2) It fails to satisfy the state's interest in preserving the marital stability of the parties.[104]
> (3) A lengthy separation period could present economic hardships to the parties since they have to maintain two households.[105]

3. Incompatibility as an Additional Ground for Divorce

There are at the present time seven states which have incompatability as an additional ground for divorce.[106] Incompatability exists when there are "conflicts in personalities and dispositions so deep as to be irreconcilable and to render it impossible for the parties to continue a normal marital relationship with each other."[107] In most cases, incompatability may be the key element in determining if there is a marital breakdown.[108] Incompatability, like the "living apart" statutes, has been plagued with the element of fault when it has been used as a ground for divorce.[109] Also, if it is given a true no-fault interpretation, it will probably preempt the other grounds of divorce to which it was added.[110] This result would occur, as in the "living apart" statutes, not because divorce would be easier, but because incompatability would be more realistic.[111]

---

[101] *Id.*

[102] It will be hard for the courts, who have dealt with the fault concept for so long, to begin using another concept overnight. This is even more difficult when the old concept is still available for consideration. *See generally* Wadlington, *supra* note 7, at 51-52.

[103] Since this ground eliminates the necessity of a court battle, it would seem that most people will use it rather than having to go through the process of proving the guilt of the other spouse. *See generally* Wadlington, *supra* note 7, at 85.

[104] Since the separation period must either be voluntary or continuous, the possibility of a reconciliation attempt is discouraged. Walker, *Disarming the Litigious Man: A Glance at Fault and California's New Divorce Legislation*, 1 PAC. L.J. 182, 203 (1970).

[105] *Trends in Divorce Reform*, *supra* note 10, at 161, *see, e.g.*, Tenny, *supra* note 48, at 61.

[106] ALA. CODE tit. 34, § 20(7) (Supp. 1971); ALAS. STAT. § 09.55.110(5) (1973); DEL. CODE ANN. tit. 13, § 1522(12) (Supp. 1970); KAN. STAT. ANN. § 60-1601 (1967); NEV. REV. STAT. § 125.010(10) (1967); N.M. STAT. ANN. § 22-7-1.1 (Supp. 1973); OKLA. STAT. ANN. tit. 12, § 1271(7) (1961). For a thorough discussion of this *see* Wadlington, *supra* note 7, at 44-52.

[107] Burch v. Burch, 195 F.2d 799, 807 (3d Cir. 1952).

[108] *See* Couch, *supra* note 23, at 260.

[109] *See, e.g.*, Note, *The No Fault Concept: Is This the Final Stage in the Evolution of Divorce*, 47 NOTRE DAME LAW. 959, 966 (1972); Tenny, *supra* note 48, at 37.

[110] Wadlington, *supra* note 7, at 52.

4. Marital Breakdown as an Additional Ground

Under the marital breakdown concept divorce is granted upon a determination by the court that there has been a pattern of marital erosion.[112] The purpose behind adopting the marital breakdown approach is to avoid having one spouse allege and prove the guilt of the other spouse. However, it is unclear why a state would adopt the marital breakdown approach and also keep their existing grounds for divorce. Such a procedure has been labeled a "half-step toward no fault divorce."[113] This is an adequate description of such action since the addition of the marital breakdown approach to existing grounds apparently has no effect on alimony, the division of property, and child custody.[114] Notwithstanding this fact, the marital breakdown approach as an additional ground for divorce has been adopted by four states[115] and has been proposed as an additional ground in Mississippi.[116] Under the proposed reform measure, "irreconcilable differences" would be additional grounds for divorce.[117] The ultimate result of this proposed reform depends on the judges who interpret the term "irreconcilable differences."[118] If the judges adopt the interpretation of those states which have an irreconcilable differences ground,the effect of the statute will be the elimination of fault as a determining factor in granting the divorce.[119] However, since this proposal does not specifically eliminate the element of fault, it is very probable that fault will be considered by the courts when they are faced with an irreconcilable differences case.[120] An interpretation of this nature would be contrary to the purpose of the statute. Yet, this would seem to be a likely interpretation since the other fault grounds are still retained and fault will still be a factor in the determination of alimony, property settlement, or child custody.

---

[111] Couch, *supra* note 23, at 261.

[112] Just one act of marital misconduct is insufficient.

[113] Comment, *Incompatability of Temperament and Irretrievable Breakdown—What Will They Mean in Alabama*, 3 CUMBER.-SAM. L. REV. 434, 435 (1972).

[114] *See, e.g.*, ALA. CODE tit. 34, § 20 *et seq.* (Supp. 1971); IDAHO CODE § 32-616 *et seq.* (Supp. 1973); N.H. REV. STAT. § 458.1 *et seq.* (1972); N.D. CENT. CODE § 14-05-01 *et seq.* (1973). Evidently, fault is still a factor in these areas.

[115] ALA. CODE tit. 34, § 20(9) (Supp. 1971); IDAHO CODE § 32-616(8) (Supp. 1971); N.H. REV. STAT. ANN. § 458.7 (Supp. 1971); N.D. CENT. CODE § 14-05-09 (Supp. 1971).

[116] H.B. 7, Reg. Sess. (1974) states:

> Irreconcilable differences causing an irremediable conflict between the parties. No final decree of divorce may be granted for this cause until sixty (60) days after the filing of the bill of complaint. The chancellor, in his discretion, may require that a report concerning the parties be submitted to him by qualified marriage counsellor before entering a final decree of divorce.

[117] It is generally recognized that "irreconcilable differences" is another way of saying "marital breakdown." See note 133 and accompanying text *infra*.

[118] It is hoped that if this bill is adopted, the courts will not destroy the purpose of the bill by allowing misconduct of the parties to be shown to prove irreconcilable differences.

[119] See notes 136 and 159 and accompanying texts *infra*.

Moreover, with time the other fault grounds will become inoperative because the parties seeking a divorce would realize that alleging irreconcilable differences is a more realistic way of obtaining a divorce.[121]

For these reasons there is no need for the fault grounds if an adequate and effective no-fault ground is adopted.[122] Whether the proposed no-fault ground, if adopted, is adequate for Mississippi, will be determined only after a few years of experience. However, because of the likely interpretations to be given to this ground, it is suggested that the proposed bill will not be sufficient to eliminate fault as a consideration in our divorce system.

B. Breakdown as the Sole Ground for Divorce

1. Divorce Proceedings

The idea of granting a divorce upon grounds other than fault is not new. In fact, the Soviet Union was probably one of the first countries to adopt the marital breakdown approach,[123] and by 1966 there were seven other countries which had adopted some form of no-fault divorce.[124] California, in 1969, was the first jurisdiction in the United States to adopt marital breakdown as a ground for divorce without retaining any fault grounds.[125] Since then seven other states have followed suit.[126] Today, in this country the marital breakdown approach is more commonly known as "no-fault" divorce. The termination of "dead" marriages, so that the state's and society's interests will be better served, is the basic premise behind the no-fault concept.[127] It is hoped that this will be accomplished by eliminating the fault concept from our present divorce laws and substituting a more reasonable standard in its place. This new standard seeks to determine the true status of the marital relationship rather than cast blame on either spouse.[128]

---

[120] *See* Wadlington, *supra* note 7, at 52, wherein it is stated: "[r]egardless of legislative intent, many courts simply can not conceive of eliminating fault for consideration without an equivocal legislative mandate to that effect, and perhaps not even then."

[121] This assumption can be drawn only if the courts are not considering "fault" with this ground. *See generally* Wadlington, *supra* note 7, at 85.

[122] Experience in some states indicates that the non-fault ground has become a popular avenue to divorce once there has been judicial clarification of some unresolved doubts. Wadlington, *supra* note 7, at 85.

[123] It was introduced in that country in 1917. Note, *The No-Fault Concept: Is This the Final Stage in the Evolution of Divorce*, 47 NOTRE DAME LAW. 959, 962 (1972).

[124] Greece, Switzerland, Yugoslavia, Norway, Sweden, Denmark, and Japan. *The No-Fault Concept*, *supra* note 109, at 962.

[125] CAL. CIV. CODE § 4506 (West 1970).

[126] COLO. REV. STAT. ANN. § 46-1-6 (Supp. 1971); FLA. STAT. ANN. § 61.052 (Supp. 1973); IOWA CODE ANN. § 598.5(7) (Supp. 1973); KY. REV. STAT. § 403.170 (1972); MICH. COMP. LAWS ANN. § 562.6(1) (Supp. 1973); NEB. REV. STAT. § 42-347 (Supp. 1972); ORE. REV. STAT. § 107.025 (1971).

Some of the statutes which have been enacted were adopted almost entirely from a model act proposed by the National Conference of Commissioners on Uniform State Laws.[129] The model plan begins by outlining the purposes of the act:

> (1) To strengthen and preserve the integrity of the marriage and to safeguard meaningful family relationships;
> (2) To promote the amicable settlement of disputes that have arisen between parties to a marriage;
> (3) To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage; and
> (4) To make the law of legal dissolution of marriage effective for dealing with the realities of matrimonial experience by making irretrievable breakdown of the marriage relationship the sole basis for its dissolution.[130]

These purposes, even though not outlined in other divorce statutes, probably apply to all divorce acts. Nevertheless, as was suggested earlier, these goals are not being met under our present divorce statutes.[131]

The various no-fault acts provide that a dissolution of marriage may be granted if: (1) the marriage is "irretrievably broken,"[132] or (2) there are "irreconcilable differences,"[133] or (3) there has been a "breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved."[134] "Irretrievably broken," although not specifically defined, can be interpreted to mean that there is complete disharmony between the spouses and that there is no reasonable prospect of reconciliation between them.[135] "Irreconcilable differences," which is used by two states, has been defined by one state as, ". . . those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved."[136] The two states which have stated that the marriage is broken when the legitimate objects of matrimony have been destroyed have not defined what is meant by "legitimate objects of matrimony."[137] Notwithstanding the names applied in the various no-fault states, the essence of each statute is basically the same.[138]

---

[127] *See No Fault Divorce*, *supra* note 5, at 103.

[128] *No-Fault Is Not Enough*, *supra* note 26, at 366.

[129] This plan is set out in complete form with comments in 5 FAM. L.Q. 205 (1971).

[130] *Id.* at 209.

[131] See notes 12 through 20 and accompanying text *supra*.

[132] *See, e.g.*, FLA. STAT. ANN. § 61.052(1)(a) (Supp. 1972); COLO. REV. STAT. ANN. § 46-1-6(1)(c) (Supp. 1971); KY. REV. STAT. § 403.170(1) (1972).

[133] *See, e.g.*, CAL. CIV. CODE § 4506(1) (West 1970); ORE. REV. STAT. § 107.025 (1971).

[134] *See, e.g.*, IOWA CODE ANN. § 598.5(7) (Supp. 1972); MICH. COMP. LAWS ANN. § 552.6(1) (Supp. 1973).

[135] *See* KY. REV. STAT. § 403.170 (1972).

As stated earlier, our present divorce laws require an adversary proceeding which often results in bitterness between the parties. It is believed that the no-fault concept will reduce the discord between the parties in a divorce suit, thus greatly benefiting everyone concerned. Although this may be the most important improvement over the old fault concept, most of the new "no-fault" statutes go beyond this and try to set out specific guidelines for the courts to follow in alimony, property settlement, and child custody proceedings. Whether or not the flaws of the fault concept are eliminated by the "no-fault" concept is still only a matter of speculation, but an examination of the changes which occur under the no-fault concept may give us some idea of the results.

One of the first changes involves the nomenclature of the law.[139] This is done so that the state may completely "cleanse" itself of the old fault concept.[140] Although this change is a minor point, it is hoped that it will help stress the fact that the fault concept has been eliminated.

The primary change under a no-fault statute, however, is that proof of misconduct is eliminated as a basis for the divorce. Thus with no-fault, a full-scale court battle, which may produce bitterness and disharmony between the parties, is eliminated.[141] This point alone, as stated above, seems to be a very logical reason for eliminating the "fault" concept. Some other reasons for adopting a no-fault act are:[142]

---

[136] CAL. CIV. CODE § 4507 (West 1970). Oregon does not define the term, and this has been mentioned as a problem for the practitioner in Oregon. *See Oregon's No-Fault Act*, *supra* note 29, at 719.

[137] For a list of things that may be considered "objects of matrimony" see Snyder, *Divorce Michigan Style—1972 and Beyond*, 50 MICH. ST. B.J. 740, 742 (1971).

[138] *See* Goddard, *The Proposal for Divorce Upon Petition and Without Fault*, 43 CAL. ST. B.J. 90, 91 (1968), wherein it is stated that the purpose of no-fault is to "provide greater family stability and a . . . concerted assault on the high incidence of divorce in our society and its often tragic consequences."

[139] Most of the states have substituted the term "Dissolution of Marriage" for "Divorce" and "Spousal Support" or "Maintenance" for "Alimony." *See, e.g.*, CAL. CIV. CODE § 4506 (West 1970); FLA. STAT. ANN. § 61.052 (Supp. 1973).

[140] Cannell, *supra* note 25, at 111.

[141] *See No-Fault Is Not Enough*, *supra* note 26, at 366.

[142] *No Fault Divorce*, *supra* note 5, at 104.

> (1) A divorce could be granted on the actual basis that led the parties to seek the divorce—the fact that their marriage was no longer viable;[143]
> (2) Elimination of the predisposition of the parties to either lie or suppress the truth in order to obtain a divorce;[144]
> (3) Problems inherent in the defenses to divorce actions would be eliminated.[145]

In addition to these, it has been suggested that the no-fault concept makes divorce less traumatic and unclogs court calendars.[146] A statute which makes divorce less traumatic would be more in line with public policy since it would ease the emotional strain on the parties in a divorce suit. Some people may be a little skeptical about adopting the act just to unclog court calendars. It must be remembered, however, that this is not the underlying purpose of the act but only a result since the parties no longer have to spend time in court proving their own innocence or the guilt of the other party.

Another public policy argument in favor of no-fault is that it is non-discriminatory[147] and eliminates the possibility of economic waste.[148] No-fault is non-discriminatory in the sense that a large portion of the prohibitive costs of a fault divorce are eliminated.[149] No-fault eliminates economic waste because unnecessary costs, such as those incurred in obtaining a migratory divorce, are no longer necessary.[150] No longer will an individual have to take time off from work or spend money in another state in order to obtain a divorce.

Perhaps the main objection to no-fault divorce is the lack of consideration of objective criteria in determining when the marriage has broken down.[151] This is a valid objection and one which is difficult to answer. The most logical rebuttal is that the present statutes, including Mississippi's, do not set out objective criteria for determining when the marriage is no longer viable.[152] In fact cruelty, the most used ground for divorce in Mississippi[153] and most other states,[154] is not defined in our statute. Yet the judges have apparently had no problem in determining what constitutes cruelty.[155] A second answer to this objection is that by the time a judge takes the bench he will have had enough professional and personal experience to enable him to apply the standard with little difficulty.[156] There have been suggestions made as to what a court could consider when determining marital breakdown;[157] however, the legislative history of the no-fault act in California indicates that the standard does not exist in the form of observable acts and occurrences but is a state of mind.[158] The committee report on the California statute states: "Irreconcilable differences will be the basis of nearly all actions for dissolution. It was chosen simply because it is in fact descriptive of the *frame of mind of the spouses* in a marriage which is no longer viable."[159] In California some of the courts may use a questionaire to help determine if irreconcilable differences exist.[160] If the questionaire is insufficient, the judge may ask questions of the parties concerning their subjective state of mind.[161]

---

[143] *Id.* This is further supported by the fact that there is very little evidence which shows that the requirement of proving guilt is of any consequence to the preservation of marriages. Baer & Davis, *supra* note 34, at 767.

[144] "If the marriage had broken down there would be no occasion to lie and if it had not broken down, the parties would not be seeking a divorce." *No-Fault Is Not Enough*, *supra* note 26, at 104.

[145] "The only defense that would be material under the no-fault concept would be the defense that the marriage had in fact not broken down." *Id.*

[146] *See* Cannell, *supra* note 25, at 109.

[147] *Cf. A Divorce Reform Act*, *supra* note 39, at 570.

[148] *Id.*

[149] *Id.*

[150] *Id.* The possibility of Mississippi residents obtaining a migratory divorce has been increased since a couple of states in our area have adopted a no-fault act. These states are Florida and Alabama.

[151] *See, e.g.*, Collyer, *The Marriage Is Irretrievably Broken*, 45 Fla. B.J. 558 (1971); McHugh, *supra* note 48, at 268; Tenny, *supra* note 48, at 45.

Another question which arises in connection with the no-fault concept is what happens when only one spouse alleges marital breakdown and the other does not answer or denies the allegation. Apparently, in some jurisdictions, if the other party affirms the allegation or does not answer, there is a presumption of a marital breakdown.[162] In either case the court is not bound by the affirmative answer or the default. It may still deny the divorce if it believes that the evidence shown by the petitioner is insufficient to establish the marital breakdown.[163] However, this power of denial should be exercised only in limited circumstances.[164] If the allegation is denied or there appears a possibility of reconciliation, the question becomes one of fact for the court to determine. The court, in this instance, has the authority to order or suggest some form of conciliation to the parties, such as marital counseling for a period ranging from 30 days to 90 days.[165] Such counseling also ensures the availability of qualified personnel to analyze the conflict. At the end of the conciliation period, the court determines, with the aid of the counselor's report, whether there is a marital breakdown. An advantage of this conciliation period is that the courts will feel more secure in their findings if they have the aid of a professional or, in the absence of such counseling, if the parties' attempted reconciliation failed.[166] It is interesting to note that under our present divorce laws this attempt at reconciliation is actually discouraged due to the fact that it may be considered condonation.[167] Another advantage of the conciliation period is that it enhances the possibility that the parties might decide to remain together and not continue with the divorce proceeding.

---

[152] *See* Miss. Code Ann. § 93-5-1 (1972), *formerly* Miss. Code Ann. § 2735 (1957). Here all of the grounds for divorce, except incurable insanity, are simply listed without an explanation as to what is sufficient to constitute one of the prescribed grounds.

[153] *See* J. Bunkley & W. Morse, *supra* note 56, at § 3.14.

[154] *See No Fault Divorce, supra* note 5, at 91.

[155] Peterson v. Petersen, 238 Miss. 190, 118 So. 2d 300 (1960); Skelton v. Skelton, 236 Miss. 598, 111 So. 2d 392 (1959); Howell v. Howell, 213 Miss. 141, 56 So. 2d 392 (1952); Stringer v. Stringer, 209 Miss. 326, 46 So. 2d 791 (1950); Starr v. Starr, 206 Miss. 1, 39 So. 2d 520 (1949).

[156] Tenny, *supra* note 48, at 45.

[157] It is suggested that the following evidence may be relevant: "the couple's past history of success or failure in the marriage; the results of voluntary or court ordered conciliation attempts; or the parties' voluntary separation before filing the dissolution petition." *Oregon's No-Fault Act, supra* note 29, at 721.

[158] *See The End of Innocence, supra* note 41, at 1319.

[159] The Report of the Assembly Committee on the Judiciary on A.B. 530 and S.B. 252, Journal of the California Assembly, 7969 Reg. Sess. at 8057 (Aug. 8, 1969) (emphasis added).

[160] *See* Cal. Civ. Code § 4356 (West Supp. 1973).

[161] Saul, *Proof of a No-Fault Divorce Case*, 45 Los Angeles B. Bull. 99, 127 (1970). Some questions that are suggested are:

(a) You have stated that there are irreconcilable differences causing the irremediable breakdown of the marriage, is it your honest belief that the marriage has broken down?

(b) Do you believe that conciliation proceedings or a waiting period could possibly restore the marriage?

Objections to required conciliation period are mainly based on the expense of such a procedure[168] and the requirement of having to see a marriage counselor.[169] It is argued that since the state claims to have a vital interest in the preservation of marriages, it should bear the burden of expense. This is indeed a bold suggestion, but it is just as bold for the state to deny a divorce to individuals, when in reality this is what they desire. The other major objection to the requirement of counseling is that many people fear such counseling or consider it an invasion of their privacy.[170] It is possible that a few people would object because of these reasons, but because of the more modern developments in the field of family counseling this would be only a small group.[171] One other question that arises in connection with required conciliation is what action should the court take if one or both parties refuse it. The no-fault statutes do not answer this question; but a refusal by one or both spouses should be a strong indication that they do not feel that there is a possibility of reconciliation and the divorce should be granted.[172]

---

[162] *See* CAL. CIV. CODE § 4355 (West 1970); COLO. REV. STAT. ANN. § 46-1-10 (Supp. 1971); FLA. STAT. ANN. § 61.052(2) (Supp. 1972); KY. REV. STAT. § 403.170(1) (1972); MICH. COMP. LAWS ANN. § 552.6(2) (Supp. 1973); ORE. REV. STAT. § 107.025 (1971). *But see* IOWA CODE ANN. § 598.10 (Supp. 1972).

[163] *See, e.g.*, COLO. REV. STAT. ANN. § 46-1-10 (Supp. 1971); FLA. STAT. ANN. § 61.052(2) (Supp. 1972).

[164] *The End of Innocence, supra* note 41, at 1325. This power should be used only "when the petitioner is unable to testify to the state of mind of irreconcilable differences (or where having so testified changes her testimony) and when conciliation proceedings are ordered and are successful." *Id.*

[165] *See* CAL. CIV. CODE § 4508 (West 1970); COLO. REV. STAT. ANN. § 46-1-10(2)(c) (Supp. 1971); FLA. STAT. ANN. § 61.052(2)(b) (1) (Supp. 1972); IOWA CODE ANN. § 598.16 (Supp. 1972); KY. REV. STAT. § 403.170(2)(b) (1972); ORE. REV. STAT. § 107.510 (1971).

[166] Henderson, *supra* note 48, at 15.

[167] *See, e.g.*, Note, *Marital Fault v. Irremediable Breakdown: The New York Problem and the California Solution, supra* note 6, at 127.

[168] *See, e.g., The No Fault Concept, supra* note 109, at 973. *See generally* Krom, *California's Divorce Law Reform: An Historical Analysis*, 1 PAC. L.J. 156, 171 (1970).

[169] *See, e.g., The No Fault Concept, supra* note 109, at 973.

There are other criticisms of the no-fault concept but they can be easily rebutted. One such criticism is that elimination of the fault concept and adoption of the no-fault concept reduces the state's interest to a minimum in providing remedies which would help save the marriage.[173] However, what adequate remedies does the state now provide?[174] The state provides that the wife is entitled to alimony and that the children of the marriage are to be supported.[175] But, these are not attempts by the state to keep the marriage together. On the other hand, if Mississippi were to adopt the conciliation process as part of the no-fault concept a remedy would be established which might help save the marriage.[176]

Another criticism of no-fault divorce is that it permits a guilty spouse to divorce an innocent spouse.[177] The real issue in this argument is whether public policy demands that the marriage be kept alive "legally" when the marriage is "morally dead." Public policy would seem to favor strongly the termination of dead marriages.[178] Even under the fault system, an innocent spouse who has been devoted to the other spouse and the marriage, can rarely save the marriage when faced with a request for a divorce.[179] In fact, under the no-fault concept there is even a greater chance that the devoted spouse may save the marriage through required conciliation. Perhaps the best answer to this argument is: "[N]o court can satisfy both parties with one solution—it is an impossibility."[180]

---

[170] *Id.*

[171] *Id.*

[172] *See, e.g., Exclusion of Fault in Divorce, supra* note 4, at 403.

[173] *Id.*

[174] Surely, the requirement that the divorce be denied unless one of the prescribed fault grounds be proven is not a remedy for the parties.

[175] *See* MISS. CODE ANN. § 93-5-23 (1972), *formerly* MISS. CODE ANN. § 2743 (1957).

[176] *See, e.g.,* M. PLOSCOWE, THE TRUTH ABOUT DIVORCE 258-59 (1955).

[177] *See, e.g.,* Clark, *supra* note 3, at 408.

[178] Keeping a marriage alive legally that is morally dead can only lead to further conflict between the two spouses.

[179] BAER & DAVIS, *supra* note 34, at 767.

The no-fault concept has also been criticized in that it will cause an increase in the number of divorces granted.[181] At this point there seems to be no sound basis for this argument. It is true that the divorce rate in California has increased since the adoption of no-fault, but there is no real evidence that this increase is due to the no-fault act.[182]

Before looking at some of the other areas in which no-fault has been introduced, it might be best to examine one criticism that is valid. In two states which have adopted no-fault there is a possibility that the court may allow misconduct of one of the parties to be shown in order to prove marital breakdown.[183] This has been criticized as inconsistent with the purposes of a no-fault statute.[184] Such a criticism is justified since the main purpose of no-fault is to eliminate any consideration of fault when determining whether a divorce should be granted. One reason given for allowing evidence of misconduct is that it might be appropriate in the case of a "hold-out" spouse.[185] Yet even this suggestion is inconsistent with the purpose of the no-fault concept. The idea is to dissolve those marriages which are no longer viable, regardless of whether or not both parties believe this to be the case. The no-fault concept protects that spouse who does not believe the marriage is dead by providing for conciliation, but it does not protect that spouse to the extent that he or she can prevent the divorce merely out of spite or in an attempt to gain an economic advantage. Since statutes that contain this language may make it hard for judges to apply the statute in the manner in which it was intended, it is recommended that any state which adopts a no-fault act should exercise care to avoid this inconsistency.

---

[180] Cannell, *supra* note 25, at 105.

[181] *Id.* at 110.

[182] *See, e.g.*, Goddard, *supra* note 28, at 408. The increase may be due to two factors: (1) some people may have postponed filing a petition from 1969 to 1970 in anticipation of the new Act; (2) residents who formerly sought out-of-state divorces perhaps realized that the new California law was more attractive. *Id.*

[183] *See* CAL. CIV. CODE § 4509 (West 1970); ORE. REV. STAT. § 107.036(2) (1971). The Oregon statute, which has basically the same language as the California statute, reads as follows:

> The court shall not receive evidence of specific acts of misconduct, excepting where child custody is an issue and such evidence is relevant to that issue, or excepting at a hearing when the court finds such evidence necessary to prove irreconcilable differences.

[184] *See, e.g.*, *The End of Innocence*, *supra* note 41, at 1326.

[185] *See Oregon's No-Fault Act*, *supra* note 29, at 721.

A "hold-out" spouse is described as a spouse who continues to oppose dissolution out of spite or in hope of a more favorable post dissolution settlement, when in fact such dissolution may be warranted. *See* text accompanying note 67 *supra*.

Adoption of the no-fault concept may or may not be limited solely to the consideration of granting a divorce. The other areas of the divorce laws which have been affected by some of the no-fault statutes are alimony, property settlement, and child custody. Some of the no-fault statutes have reformed these areas considerably, while others have made only minor changes.

2. Alimony and Property Settlements

The major reform in the area of alimony and property settlements is that evidence of misconduct has been eliminated from the court's determination of these issues.[186] Since one of the purposes of no-fault is to reduce the ill will between the parties, the elimination of fault in the determination of alimony would appear to be logical.[187] A no-fault statute also prevents a spouse from using the guilt of the other spouse as a tool to obtain a more favorable alimony or property award.[188] The advantage of this is that when the parties know that they can not use the guilt of the other spouse as a basis for obtaining alimony or property settlements they may agree to alimony awards and property settlements before they get to court.[189]

However, the elimination of fault per se is only a half-step towards correcting the problems outlined earlier.[190] As previously stated, our present statute fails to set up specific guidelines which the court may consider in determining alimony or property settlements.[191] In fact our statute gives unbridled discretion to the court concerning these matters.[192] Some of the no-fault statutes fail to correct this and continue to give the judge unbridled discretion on the matters of alimony and property settlements.[193] If the no-fault concept is going to be superior to the fault concept additional legislation should be enacted which sets forth specific criteria to be used in the determination of any economic settlement. Three states have enacted such legislation.[194] The Colorado and Kentucky statutes were copied from the *Uniform Marriage and Divorce Act*[195] and are perhaps the best examples a state could follow when studying a no-fault plan. The applicable sections in these acts attempt to eliminate the need for alimony by first meeting the financial needs of the parties with an equitable disposition of the property.[196] If this is not possible and the spouse seeking alimony can not secure gainful employment for the various reasons listed in the statute, then an award of alimony may be given.[197] This spousal maintenance by property division rather than alimony seems to be a more logical way of support,[198] since in many instances the spouse's income would be insufficient to meet the needs of two separate families.[199]

---

[186] *See* CAL. CIV. CODE § 4509 (West 1970); COLO. REV. STAT. ANN. § 46-1-14(2)(a) (Supp. 1971); KY. REV. STAT. § 403.190(1) (1972); ORE. REV. STAT. § 107.036(2)-(3) (1971). In Florida a court may consider the *adultery* of a spouse in determining alimony. FLA. STAT. ANN. § 61.08(1) (Supp. 1972). There is no language in the Iowa statute concerning this point, but the Iowa court has interpreted the statute to mean that misconduct is no longer a relevant factor in considering alimony. *In re* The Marriage of Gudenkauf & Gudenkauf, 204 N.W.2d 586, 588 (Iowa 1973).

[187] *See* BAER & DAVIS, *supra* note 34, at 770.

[188] *Id.* at 766. *See* text accompanying note 66 and note 67 *supra*.

[189] *See, e.g.*, Goddard, *supra* note 28, at 414; Wadlington, *supra* note 7, at 79.

[190] *See* text accompanying notes 53-69 *supra*.

[191] *See* notes 58 & 59 and accompanying text *supra*.

[192] *See* MISS. CODE ANN. § 93-5-23 (1972), *formerly* MISS. CODE ANN. § 2743 (1957).

[193] FLA. STAT. ANN. § 61.08 (Supp. 1972); IOWA CODE ANN. § 598.21 (Supp. 1972); MICH. COMP. LAWS ANN. §§ 552.13, 552.23 (1) (Supp. 1973).

However, even these statutes are subject to one valid criticism. That is, there is no reasonable standard for determining the true financial status of the parties.[200] Since this same criticism can be applied to our present statutes, this flaw is not unique to no-fault statutes. This is still a valid criticism, however, and should be a signal to those states which subsequently adopt a no-fault statute. One solution to this problem would be to require the parties to file a financial affidavit with the court.[201] This affidavit would inform the court of each party's financial status thereby enabling the court to determine who should receive alimony and how much they should receive.

One other notable change under the no-fault concept is that alimony is not restricted; it may be granted to either spouse.[202] This is an abrogation of the common law rule that it is the duty of the husband to support the wife.[203] This change is reasonable in view of the fact that there may be cases where the husband would need alimony in order to sustain himself.[204] The legislature may be leery of permitting alimony to either spouse out of fear that a man who has married a wealthy woman may seek alimony and not attempt to support himself. This fear, however, is unjustified in view of the fact that the statute would have specific guidelines for determining the amount of alimony to be awarded.

---

[194] COLO. REV. STAT. ANN. §§ 46-1-13, -14 (Supp. 1971); KY. REV. STAT. §§ 403.190, 403.200 (1972); ORE. REV. STAT. § 107.105(c)(A)-(H) (1971).

[195] This Model Act was drafted by the *National Conference of Commissioners on Uniform State Laws* and has been recommended by them for enactment in all states. A copy of the act may be found in *Uniform Marriage and Divorce Act*, 5 FAM. L.Q. 205 (1971).

[196] *See Uniform Marriage and Divorce Act*, 5 FAM. L.Q. 205, 234 (1971).

[197] *Id.*

[198] *See No-Fault Is Not Enough, supra* note 26, at 376.

[199] Clark, *supra* note 3, at 410.

[200] *No-Fault Is Not Enough, supra* note 26, at 273.

[201] *See* IOWA CODE ANN. § 598.13 (Supp. 1972). See FLA. R. CIV. P. 1.975; and *In re* Florida Rules of Civil Procedure, 253 So. 2d 404, 414 (Fla. 1971), for an example of an affidavit that may be used to determine the financial status of the parties.

[202] CAL. CIV. CODE § 4801 (West 1970); COLO. REV. STAT. ANN. § 46-1-14(1)(a) (Supp. 1971); FLA. STAT. ANN. § 61.08 (Supp. 1972); IOWA CODE ANN. § 598.21 (Supp. 1972); KY. REV. STAT. § 403.200(1) (1972); MICH. COMP. LAWS ANN. § 552.23 (1) (Supp. 1973); NEB. REV. STAT. § 42-365 (Supp. 1972); ORE. REV. STAT. § 107.105(c) (1971).

3. Child Custody and Support

Child custody, which is perhaps the most emotional consideration in divorce, has also undergone reform in the no-fault statutes. These reforms attempt to ensure that the best interest of the child will be served by codifying existing case law. It is hoped that by specifically outlining in the statute how the court should determine child custody, the courts will find it easier to resolve disputes over custody of a child.

The element of fault should not be completely eliminated as a factor in determining child custody, but its use should be restricted. Most of the no-fault statutes allow only evidence of misconduct which would affect the spouse's relationship with the child.[205] This is a reasonable restriction since there may be some misconduct that would be relevant in a determination of the child's best interest.[206] Other factors that are listed in the various statutes as being relevant to the child's best interest are:

(1) The wishes of the child's parent or parents as to his custody;
(2) The wishes of the child as to his custodian;
(3) The interaction and interrelationship of the child with any other person who may significantly affect the child's best interest;
(4) The child's adjustment to his home, school, and community; and
(5) The mental and physical health of all individuals involved.[207]

These factors are most commonly relied on by the courts today, but the language in the statutes does not limit the courts to these specified factors.[208] It should be further recognized that these factors are valid "only when and to the extent that they promote the best interest of the child."[209]

---

[203] *See, e.g.*, Annot., 66 A.L.R.2d 880, 882 (1959). *See* note 56 and accompanying text *supra*.

[204] H. CLARK, THE LAW OF DOMESTIC RELATIONS § 14.6 (1968).

[205] CAL. CIV. CODE § 4509 (West 1970); COLO. REV. STAT. ANN. § 46-1-24(2) (Supp. 1971); KY. REV. STAT. § 403.270(2) (1972); ORE. REV. STAT. § 107.036(2) (1971).

[206] *See Oregon's No-Fault Act*, *supra* note 29, at 723. However, the courts are going to have to handle this very carefully and not let misconduct which has no relevancy to the child's best interest persuade their determination of who gets custody of the child.

[207] COLO. REV. STAT. ANN. § 46-1-24(1) (Supp. 1971); KY. REV. STAT. § 403.270(1) (1972).

The no-fault statutes also provide guidelines for the court in determining child support. The guidelines set forth in the *Uniform Marriage and Divorce Act* and the Colorado and Kentucky statutes are perhaps the most adequate. The factors set up in these statutes are:

(1) The financial resources of the child;
(2) The financial resources of the custodial parent;
(3) The standard of living the child would have enjoyed had the marriage not been dissolved;
(4) The physical and emotional condition of the child and his educational needs; and
(5) The financial resources and needs of the non-custodial parent.[210]

These factors should be sufficient to enable a court to adequately determine the amount of child support each parent should pay. Our courts may use some of these factors in determining child support,[211] but with a legislative mandate they would be required to consider all of them. Statutory requirements such as these are needed because of the need to eliminate unreasonable litigation over child support. If the parties know that their financial condition will be reviewed by the court, they will be less apt to ask for an unreasonable amount for child support thereby avoiding arguments over this issue.[212]

Another way in which the various no-fault statutes attempt to protect the best interest of the child is by giving the court the power to:

(1) Appoint an attorney to represent the child;[213]
(2) Require investigations and reports concerning custodial arrangements;[214] and

---

[208] *See Uniform Marriage and Divorce Act, supra* note 196, at 241. It is best not to limit the court only to these factors because each case will involve circumstances which can not be forseen in advance.

[209] Podell, Peck, & First, *Custody—To Which Parent*, 56 MARQ. L. REV. 51, 55 (1972).

[210] COLO. REV. STAT. § 46-1-15 (Supp. 1971); KY. REV. STAT. § 403.210 (1972). *See also* Uniform Marriage and Divorce Act, *supra* note 195.

[211] *See, e.g.*, Harrell v. Harrell, 231 So. 2d 793 (Miss. 1970); Lowry v. Lowry, 229 Miss. 376, 90 So. 2d 852 (1956).

[212] This same argument can be applied to the alimony and property settlements, since the courts, under a no-fault act, have the power to consider the financial condition of the parties. See note 201 and accompanying text *supra*. However, as with alimony and property settlements, the statutes must provide for some method to determine the financial status of the parties. See note 201 and accompanying text *supra*.

[213] *See, e.g.*, COLO. REV. STAT. § 46-1-16 (Supp. 1971); ORE. REV. STAT. § 107.425(2)(b) (1971).

[214] *See, e.g.*, COLO. REV. STAT. ANN. § 46-1-27 (Supp. 1971); KY. REV. STAT. § 403.300

(3) Hold interviews with the child.[215]

Not all of the new no-fault acts allow for these powers, but it is believed that those which do are more adequately protecting the child's best interest. However, regardless of what the present statutes require or what future statutes may require, it must be remembered that all of these guidelines must be evaluated against contemporary and sociological studies of child custody.[216]

V. CONCLUSION

Although the divorce proceedings and the collateral areas of alimony, property settlement, and child custody have been given more careful consideration in the new no-fault acts than other factors, there are other areas which are also covered in the various no-fault statutes. The enactment of no-fault legislation also offers an excellent opportunity for the state to reexamine its statutory scheme as to: residency requirements, legal separation, existing defenses to divorce,[217] temporary orders or temporary injunctions, and visitation rights.

It is time that our legislature realizes that there are problems in our divorce laws and that some action should be taken to correct these problems. Even though it is believed that a no-fault act will help solve these problems and should therefore be adopted in Mississippi, the fact remains that there should be careful study and planning before such legislation is adopted.[218]

The proposed bill introduced recently in the Mississippi Legislature,[219] which would make "irreconcilable differences" an additional ground for divorce, does not eliminate the fault concept entirely from all aspects of divorce. In fact, because of the vagueness of the ground and the retention of other fault grounds, it is likely that fault will be

---

(1972).

[215] *See, e.g.*, COLO. REV. STAT. ANN. § 46-1-26 (Supp. 1971); KY. REV. STAT. § 403.290 (1972).

[216] *No-Fault Is Not Enough*, *supra* note 26, at 379.

[217] It may not be necessary to abolish these by statute since the purpose of the no-fault act itself implies that there would be no affirmative defenses. However, since these defenses were established by our courts, *e.g.*, Stribling v. Stribling, 215 So. 2d 869 (Miss. 1968) (condonation); Crosby v. Hatten, 213 Miss. 240, 56 So. 2d 705 (1952) (collusion); Oberlin v. Oberlin, 201 Miss. 228, 29 So. 2d 82 (1947) (recrimination), a specific legislative mandate may be required in order to emphasize to the courts that the affirmative defenses are abolished.

[218] Some excellent examples of a no-fault act are the Colorado Act, COLO. REV. STAT. ANN. § 46-1-1 *et seq.* (Supp. 1971); and the Kentucky Act, KY. REV. STAT. § 403.110 *et seq.* (1972). *See also Uniform Marriage and Divorce Act*, 5 FAM. L.Q. 205 (1971) (Model Act).

[219] See note 116 *supra*.

considered in order to prove this particular ground. Therefore, it is recommended that before the legislature adopts the proposed measure they should give considerable thought to the possibility of adopting a complete no-fault act—one which would help correct all of the problems of our present law. Should the legislature adopt this particular proposal without more, it will be neglecting its responsibility to the people of Mississippi and continuing to place an undue burden on the courts and attorneys throughout the State.

Clayton J. M. Adkinson

GROUP AND PREPAID LEGAL SERVICES

> Sarah, a 43-year-old school teacher, received a $75 payment-overdue notice for a bill which she had already paid. The credit manager, not wanting to waste time with Sarah, told her to pay or else! He felt certain she would pay the bill because she could not handle the problem alone nor could she afford a lawyer. But Sarah had just become a member of a legal services group sponsored by her teachers association. For $4 per month she is entitled to certain legal services, one of which will enable her to solve her problem with the credit manager without having to do so alone. Although the method relied upon by Sarah to cope with this problem remains a fiction in Mississippi, it has become a reality throughout many parts of the nation.[1]

If lawyers are required to improve the legal system,[2] two critical questions will emerge. First, who will the improvements be designed to benefit; and secondly, who *will* such improvements actually benefit—society or lawyers? Without a doubt the first question may be answered: "society," by the entire nation in unison. Equally without a doubt the second question is not susceptible to such definitive or unanimous resolution. The second question is one of intent on the part of lawyers, and has been the line of demarcation in a great national battle being waged over the legal profession's control in determining the form of legal services that will be provided to persons of moderate means. The battle exists not merely between segments of the public and the legal profession, but also between segments of the legal profession itself.

Some attorneys feel that the organized bar is enmeshed in the desire to obtain and hold the " 'better' business or the 'better' clients,"[3] and that to do so the bar must retain those methods of delivering legal services with which it is familiar. Stare decisis has seemingly been transplanted to the office. The legal profession is subject to the observation that it still resembles the guilds of 300 years past, protecting and advancing its own interests; but that observation is preferable to the observation that lay people will make if innovative delivery systems are not furnished: that rigor mortis has set in. Union leaders are threatening to wrest complete control over the availability of legal services from the organized bar[4] and are threatening to solve the union members' legal problems in their own way.[5] A sense of urgency and frustration over the apparent fact that the legal profession is not concerned with lower-middle income groups has enveloped these union leaders.[6] Reflecting both union and nonunion opinion, a plethora of national magazines, newspapers, consumer reports, and journals have been hailing the arrival of group and prepaid legal services as the answer to many of the problems of the middle class.[7]

---

[1] Murphy, *Group Legal Service Plans in California, Florida, Missouri, and Oregon*, 36 U.P. News 7 (1972).

[2] ABA Code of Professional Responsibility, Canon 8 (1970), which reads, "A lawyer should assist in improving the legal system."

[3] B. Christensen, Lawyers for People of Moderate Means 207 (1970). The word "enmeshed" is appropriate for the new law graduate who finds, upon arriving at the firm, that a special kind of solicitation exists: "Son, you're going to have to become a member of the PTA, First Baptist Church, Save The Beaver Fund Drive . . . ad nauseum."

I. Terms

Terms are being tossed around now in such a fashion that eventually there may cease to be any distinction between "group" and "prepaid" legal services plans, either in the manner of operation or in the manner of regulation. Presently, the distinction is based on method of payment for services rendered. Peter F. Sloss has distinguished the two terms as follows:

> Prepaid legal services is any system by which the recipient of legal services, or someone on his behalf, pays for legal services in whole or in part, by means of periodic payments rather than on a "fee for service" basis (*i.e.*, fee based on the nature or quantity of services performed or the results obtained).
>
> In a broad sense, the term "group legal services" is used to refer to any arrangement between a lawyer or lawyers and a group of potential clients (*e.g.*, labor union, trade association, etc.) under which the lawyers undertake to render services for members of the group.[8]

Whether the "group" or "prepaid" legal services plan is employed, either the "open panel" or "closed panel" type of attorney selection may be utilized.[9] The definitions of group and prepaid legal services plans do not hinge on the applicability of open or closed selection methods. Both may utilize either type of attorney selection. However, in the past, group plans, advanced initially by unions, have been more of the closed panel variety, whereas prepaid plans, advanced more by bar associations, have leaned toward allowing as much individual freedom of choice as possible.[10] Consequently, more lawyers may be involved in an open panel arrangement—an obvious advantage to the bar as a whole.

---

[4] In the four leading United States Supreme Court cases on group legal services, United Transp. Union v. The State Bar of Michigan, 401 U.S. 576 (1971); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963), the Court allowed each group involved to provide legal services in a manner previously prohibited by individual bar associations.

[5] Address by Murray H. Finley, Apr. 27, 1972, in ABA National Conference on Prepaid Legal Services 53, 58 (1972).

[6] *Id.* at 60-61. Mr. Finley states:

> Gentlemen [of the legal profession], we are doing your work for you through the Trade Union Movement! But we are doing it from the basis of the people whom all of us, supposedly, are thinking about—the people in need.

Id. at 60.

[7] *Hearings on H.R. 13938 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 7 (1972) (hereinafter cited as *Hearings*), citing such publications as The Wall St. Journal, N.Y. Times, L.A. Times, and Business Week.

[8] Sloss, *Introduction*, Practicing Law Institute Prepaid Legal Plans 9 (1973).

II. VOID LEFT BY LEGAL AID

The type of legal services under discussion in this comment must be distinguished from legal aid programs for the poor which are presently offered through the Office of Economic Opportunity (OEO) or otherwise.[11] The OEO programs enable legal services to be provided to poor families depending on the level of income and number of persons within the family group.[12] Since the wealthy have little problem in obtaining legal services, we are left with the anomalous situation where the poor and the wealthy have available legal services, but the moderate income group has only a big question mark.

A few similarities can be observed between legal aid for the poor and legal services for moderate income groups. Past notions that legal services are basically a function of property ownership have been applied to both poor and moderate income groups.[13] The rationale behind those notions is that if there is no property ownership there is no need for providing legal services.[14] Such thinking should not continue, but instead should be relegated to antiquity, particularly in light of ever-increasing modern problems (and some not so modern) such as consumer and landlord-tenant problems. For instance, in New York City alone over 500,000 landlord-tenant cases are commenced each year. Of the 50,000 cases which reach court, more than half of the tenants appear without counsel.[15] Development of legal aid programs has shown that there are unmet legal needs among the poor, and it can be assumed that at least the same condition exists[16] if not in greater degree among moderate income groups.[17] Group and prepaid legal services must therefore meet the void left by legal aid programs and as yet unfilled by present delivery systems.

---

[9] The terms "open panel" and "closed panel" refer to the breadth of choice an individual has in selecting an attorney. Under a pure open panel arrangement, an individual may choose any attorney licensed to practice law within the state. Under a pure closed panel arrangement, an individual may choose only an attorney who is a member of the panel. Whitmer, *Group and Prepaid Legal Services Phase I: Standards*, 36 KY. B.J. 21, 22 (1972). There are all sorts of permutations of the above, e.g., an open panel plan which requires a lawyer to agree to certain terms is in effect a closed panel plan.

[10] *See generally* Roberts, *Union Group Legal Services: An Experiment in Group Legal Practice*, 48 WASH. L. REV. 597, 598-600 (1973).

[11] For an in-depth analysis of legal aid for the poor in Mississippi see Stevens & Maxey, *Representing the Unrepresented: A Decennial Report on Public-Interest Litigation in Mississippi*, 44 MISS. L.J. 333 (1973).

[12] Economic Opportunity Act Amendments of 1967 § 222, Pub. L. No. 90-222, 81 Stat. 672, *amending* Economic OpportunityAct of 1964, Pub. L. No. 88-452, 78 Stat. 508.

[13] B. CHRISTENSEN, *supra* note 3, at 20.

[14] *Id.*

The parameters of a moderate-income group are relative and not easily defined. Essentially, the limits begin where legal aid for the poor ends, and end where a sufficient level of income to cover legal expenses begins. In Mississippi the lower limit of the moderate income group is around $4,000,[18] and the most often quoted upper limit is $15,000.[19] These figures are purely arbitrary, however, since little actuarial data has been established. The following table reveals the number of families in Mississippi in 1969 within the parameters of the above established group:

---

[15] Lefkowitz, *The Non-Availability of Legal Services to Persons of Moderate Income*, 27 Record of N.Y.C.B.A. 144, 146 (1972). In addition to that astonishing fact, within the Small Claims Court of the Civil Court there are over 50,000 persons who appear, most of whom are within a moderate-income group and appear without counsel. *Id.* at 145-46.

[16] Sloss, *supra* note 8, at 10.

[17] B. CHRISTENSEN, *supra* note 3, at 21-25. Christensen states:

> No one yet knows how much legal service the poor might be able to use; for immediate practical purposes, however, the demand can probably be regarded as virtually limitless.

Id. at 21. When one considers that some problems, such as consumer credit, have a greater impact on small and moderate income groups than other groups, the need for available counsel is more readily apparent.

[18] To qualify for legal aid for the poor, a family of four must have no more than $3,800 in income. Interview with Francis Stevens, Action Director, North Mississippi Rural Legal Services, Sept. 15, 1973.

[19] B. CHRISTENSEN, *supra* note 3, at 5. The figures are arbitrary, but it must be remembered that some attorneys cannot afford to hire themselves for any significant problem.

Family Income	Number of Families
$ 4,000—4,999	42,367
5,000—5,999	41,427
6,000—6,999	40,979
7,000—7,999	36,943
8,000—8,999	33,428
9,000—9,999	26,958
10,000—11,999	46,959
12,000—14,999	40,562
Total 309,622	
Total number of families in all income groups	534,444
Median income of all families	$6,071[20]

The above table reveals that almost 58 percent of the families in Mississippi in 1969 were within the moderate-income group, and even if the $10,000-15,000 income families were discounted, over 41 percent of the families remain within the moderate income group. A clientele which represents over half the families, or even almost half the families within the state cannot long be overlooked.

III. CONTROLLING POWER OF THE BAR

Although the organized bar has in the past resisted change, it is now beginning to change in some respects. But what should be the bar's great embarrassment is that the changes are being prompted from without rather than within. Until 1969 the ABA Canons of Professional Ethics provided the method of control by the bar over the delivery of legal services. Then a trio of United States Supreme Court cases invalidated that portion which prohibited group legal services plans from being implemented[21] and prompted a revision of the ABA Canons of Professional Ethics. The first decision, which came in 1963, *NAACP v. Button*,[22] upheld the NAACP activities of providing legal services by its staff attorneys to members and non-members involved in racial discrimination cases. In the following year, *Brotherhood of Railroad Trainmen v. Virginia*[23] upheld a union's activities of advising its injured members on obtaining legal counsel and of selecting counsel for them. The third slap on the wrist came in 1967 in *United Mine Workers v. Illinois State Bar Association*,[24] which upheld a union plan to provide legal services to union members involved in workmen's compensation procedures. These three cases were decided on the basis of state regulations which were repugnant to the first and 14th amendments. These amendments have been held to guarantee that groups can band together in a manner which will enable them to assert their legal rights effectively and economically.[25]

---

[20] *1970 Census of Population, PC(1)-C26 Mississippi.*

[21] Canon 35 read as follows:

> A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such organization in respect to their individual affairs.

For a brief discussion of Canon 35 *see* Barlow, *Legal Services Insurance: Will it Work?*, 16 LA. B.J. 349 (1968). For a look at early group practices which were prohibited *see* Weihofen, *Practice of Law by Motor Clubs—Useful but Forbidden*, 3 U. CHI. L. REV. 296 (1936).

[22] 371 U.S. 415 (1963). Earlier writers limited *Button* to a civil rights context. *See*

When a new Code of Professional Responsibility replaced the Canons of Professional Ethics, the above three decisions were reflected in several new Canons, Ethical Considerations, and Disciplinary Rules.[26] For example:
Canon 2 reads:

> A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.[27]

Ethical Consideration 2-1 reads:

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel.[28]

Disciplinary Rule 2-103(D) reads in part:

> A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his

---

generally Note, 34 Miss. L.J. 344 (1963).

[23] 377 U.S. 1 (1964).

[24] 389 U.S. 217 (1967).

[25] United Transp. Union v. The State Bar of Michigan, 401 U.S. 576, 580 (1971).

[26] As defined by the Code of Professional Responsibility:

> The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers . . . .
>
> The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive.
>
> The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

ABA Code of Professional Responsibility (Preliminary Statement 1970).

[27] ABA Code of Professional Responsibility, Canon 2 (1970).

[28] ABA Code of Professional Responsibility, EC 2-1 (1970).

> services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:
>
> (1) A legal aid office . . . .
> (2) A military legal assistance office.
> (3) A lawyer referral service . . . .
> (4) A bar association . . . .
> (5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:
>
> (a) The primary purposes of such organization do not include the rendition of legal services.
> (b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.
> (c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.
> (d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.[29]

Although an improvement over its predecessor, Disciplinary Rule 2-103(D) was immediately criticized as being inadequate. The strongest criticism has come from Robert Nahstoll who has characterized the existing provision as follows:

> Whatever may be true of other portions of the new Code of Professional Responsibility, Disciplinary Rule (DR) 2-103(D)(5), respecting group legal services arrangements, is unrealistic, inadequate, irresponsible, and unprofessional. It disserves both the public and bar.[30]

An indirect criticism came from yet a fourth United States Supreme Court decision, *United Transportation Union v. State Bar of Michigan*,[31] which upheld group legal services activities that appeared to fly into the face of Disciplinary Rule 2-103(D). In that case a union had obtained fee-setting agreements from selected attorneys and had steered its members toward these attorneys. The Court said that the union had a right to protect its members from exorbitant fees and "inadequate counsel," and, as if thinking of that part of Disciplinary Rule 2-103(D)(5) which limits group activities to a "controlling constitutional interpretation," further stated:

---

[29] ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(D) (1970).

[30] Nahstoll, *Limitations on Group Legal Services Arrangements Under the Code of Professional Responsibility, DR 2-103(D)(5): Stale Wine in New Bottles*, 48 TEXAS L. REV. 334 (1970).

[31] 401 U.S. 576 (1971).

> [b]ut the principle here involved cannot be limited to the facts of this case. At issue is the basic right to group legal action. . . .[32]

Through this case and the earlier trio of cases,the Court has reiterated that group activity to obtain "meaningful access to the courts" is a basic constitutional right.[33] The bar cannot restrain access to the courts through its disciplinary powers, and one would hope that the Court will not be required to render a fifth decision to once again explain such to the bar.[34]

In light of the *United* decision, the criticism that Disciplinary Rule 2-103(D) is too restrictive has increased.[35] Consequently, the American Bar Association is presently studying a revision of the entire rule,[36] and, considering the pressure that exists from all segments of society, that revision seems inevitable. The Committee on Professional Responsibility of the New York State Bar Association has already recommended that the state organization revise its Code of Professional Responsibility, independent of the ABA, to allow a more enlightened use of group practice for moderate-income groups.[37] At present no formal bar activity to revise the Code of Professional Responsibility is underway in Mississippi.[38]

Any revision of the existing Disciplinary Rule 2-103(D) would have to be concentrated on subparagraph (5) with particular emphasis placed on parts (a) and (b). Parts (a) and (b) require that a qualified group must be one with primary purposes other than rendition of legal services, and the legal services which are rendered must be "incidental and reasonably related to the primary purposes . . . ."[39] Although a consumers' cooperative formed for the purposes of obtaining cheaper and better legal services would violate the rule, the language of *United* seems to permit such as a constitutionally protected activity.[40] The requirement that the services rendered must be related to the group's purposes is likewise too restrictive. The New York State Bar Association has rejected a legal services plan proposed by the Amalgamated Meat Cutters because the proposed services would have extended beyond employment related purposes. The Committee on Professional Responsibility of the New York State Bar Association, however, is of the opinion that in the future such requirements will be too restrictive.[41]

---

[32] *Id.* at 585.

[33] *Id.*

[34] For a dramatization of the bar's slowness in "catching on" see Stolz, *Sesame Street for Lawyers: A Dramatic Rendition of United Transportation Union v. The State Bar of Michigan, 401 U.S. 576 (1971),* 36 U.P. NEWS 14 (1971).

[35] *See* Roberts, *supra* note 10, at 597.

[36] COMMITTEE ON PROFESSIONAL RESPONSIBILITY, REPORT, 27 RECORD OF N.Y.C.B.A. 79, 81 (Supp. 1972).

[37] *Id.* at 81-82.

[38] Telephone interview with George Van Zant, Executive Director Mississippi State Bar Association, Sept. 15, 1973.

[39] ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103 (D)(5)(a), (b) (1970).

One purpose of the rule quoted above is to preserve the traditional attorney-client relationship and prevent solicitation.[42] The notion of preserving the attorney-client relationship may be somewhat illusory when one considers that an attorney-client relationship seldom exists, practically speaking, among those without the wherewithal to go to an attorney.[43] If the organized bar were to take the initiative in establishing legal services plans which are of the open panel variety, the traditional attorney-client relationship could be maintained. But in the absence of such a bar-sponsored plan, groups will lean toward closed panel plans which give the group more control over the services rendered.

Bans on solicitation find their genesis in the common law misdemeanors of maintenance, champerty, and barratry[44] but modern ethical rules on solicitation have been characterized as being more like "etiquette" rules.[45] One writer has even suggested that loss of "professionalism" does not worry the legal profession nearly so much as "the *competitive advantage* that 'improper' solicitation gives to lawyers who engage in it."[46] The wrong that is involved here is the reluctance of the organized bar to discontinue to "sit selfishly on its dignified inertia" despite the needs of the public.[47]

---

[40] United Transp. Union v. State Bar of Michigan, 401 U.S. 576, 585 (1971).

[41] COMMITTEE ON PROFESSIONAL RESPONSIBILITY, *supra* note 36, at 81.

[42] Smith, *Canon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available,"* 48 TEXAS L. REV. 285, 301-10 (1970). Other rules governing solicitation are ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101, 2-102 (1970).

[43] *See* Address by Murray H. Finley, *supra* note 5, at 54-55.

[44] R. PERKINS, CRIMINAL LAW 522 (2d ed. 1969). Maintenance—officious intermeddling in a suit by assisting another in its prosecution. Champerty—volunteering one's services by agreeing to share the rewards of a victorious suit. Barratry—stirring up suits at law or otherwise. *Id.* at 522-23.

[45] H. DRINKER, LEGAL ETHICS 211 (1953).

[46] B. CHRISTENSEN, *supra* note 3, at 27. That comment raises possible anti-trust questions with regard to activities which limit competition among lawyers. *See* Comment, *Minimum Fee Schedules As Price Fixing: A Per Se Violation of the Sherman Act*, 22 AM. U.L. REV. 439 (1973). Keeping in line with Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973), Mississippi has recently abolished its minimum fee schedules. See transcript, 1973 Mississippi Bar Ass'n Convention.

One change that would be both an improvement and within the Code of Professional Responsibility is open specialization. Disciplinary Rule 2-105(A)(4) allows lawyer specialty certification which is regulated under state law.[48] Although Mississippi has yet to pursue such a course, the result of more open specialization, in a manner comparable to the medical profession, will make open panel plans as attractive as closed panel plans.[49] By developing methods of recognizing and designating lawyers as specialists, sufficient economies of operation and problem familiarization would allow lawyers to swiftly and economically deal with specialized problems. The quality of the services would increase, and the cost of the services would decrease; control of the services by a group to insure high quality and low cost would therefore be unnecessary. At present no formal bar activity to consider regulation of specialization is underway in Mississippi.[50]

IV. Delivery Systems

It is not presently known how many group and prepaid legal services plans are in effect. As of April, 1972, all but seven states had some form of group legal services plan.[51] However, any survey of such plans would necessarily be incomplete for not all plans are made known to the public. The reason is founded on fear—fear of the organized bar. Sustained attacks by the bar have forced some plans "underground."[52] In fact, at least one such "underground" group plan is in the planning stage in Mississippi. Upon interviewing those persons in charge of the group plan, this writer was asked not to divulge names, locations, or the nature of the group. Such is the fear instilled by the organized bar. As a consesequence, little statistical data has been developed concerning group and prepaid legal services. Registration requirements for such plans exist in only five states,[53] and even those states have not gathered a sufficient amount of data that would lead to conclusive comparisons of different plans.

---

[47] Nahstoll, *supra* note 30, at 338.

[48] ABA Code of Professional Responsibility DR 2-105 reads in part:

> (A) A lawyer shall not hold himself out publicly as a specialist or as limiting his practice,except as permitted . . . as follows: . . . .
>
> > (4) A lawyer who is certified as a specialist in a particular field of law or law practice by the authority having jurisdiction under state law over the subject of specialization by lawyers may hold himself out as such specialist but only in accordance with the rule prescribed by that authority.

[49] Address by Emanuel Honig, Apr. 28, 1972 in ABA National Conference on Prepaid Legal Services 105, 106-108 (1972).

[50] Telephone interview with George Van Zant, Executive Director Mississippi State Bar Association, Sept. 15, 1973.

[51] Address by Frederick G. Fisher, Jr., Apr. 27, 1972, in ABA National Conference on Prepaid Legal Services 78 (1972).

[52] Murphy, *supra* note 1, at 8.

The Shreveport Plan, designed to develop needed statistical data, is perhaps the most famous prepaid legal services plan. Since its inception, the American Bar Association has lent its blessings.[54] The Shreveport (Louisiana) Bar Association formed the plan in conjunction with Laborers Local Union 229. A nonprofit corporation administers the open panel plan for the benefit of the union members and their families. Free selection of attorneys is maintained, and attorneys may charge normal fees; however, the plan, financed partially by a dues check-off, pays for a major portion of the cost of those legal services covered by the plan. For example, for office work the member pays the first $10 and the plan pays the next $250. Therefore, the only real difference made by the plan is the assistance an individual receives when paying for legal services rendered. Since freedom of attorney selection is preserved, no control is exerted by the union over the attorney or the services he renders.[55]

The state of California already has in existence over 200 group plans involving organizations of all types including unions, trade associations, and teacher associations with a combined participating membership of over 750,000.[56] The plans are of two basic types: (1) only specific services are rendered, and the group as a whole pays for all such services; and (2) any type of service is rendered and the group pays a retainer while the individual pays a fee for services rendered. Generally, the plans involve closed panel arrangements as opposed to the open panel arrangement of the Shreveport Plan. In addition to providing the usual legal services, some group plans are conducting educational programs directed at the members on such topics as wills, auto accidents, how to use courts of small claims (even how to present a case), how to write letters—in other words, a sort of legal first aid program.[57] By acquainting members with legal problems, preventive law can be practiced to keep small problems from becoming big problems. Cost savings here are obvious.

---

[53] The states are California, Florida, Missouri, Oregon, and Kentucky. *Id. See* Comment, *Group and Prepaid Legal Services Plans: Kentucky Rules Provide Ethical Standards*, 61 KY. L.J. 560 (1972-1973).

[54] For a thorough discussion of the Shreveport Plan see Politz, *Shreveport Plan for Prepaid Legal Services—A Unique Experiment*, 32 LA. L. REV. 45 (1971).

[55] *Id.*

[56] Murphy, *supra* note 1, at 8.

[57] Address by Harriet Whitman Thayer, Apr. 27, 1972, in ABA NATIONAL CONFERENCE ON PREPAID LEGAL SERVICES 62, 66-69 (1972).

All sizes of law offices are involved in servicing the California group plans. Of the 82 law offices involved as of October, 1971, approximately one-half were small offices (two to five partners), one-fourth were solo offices, and the remainder were either large firms or staff counsel.[58]

The influence of labor unions on the development of group legal services has been profound. The initiative to provide such services has been demonstrated more by the unions and, unfortunately, less by the bar. One reason is the national strength and size of union membership which is accustomed to solving problems in a collective manner. The national percentage of union membership among nonagricultural workers is approximately 28 percent.[59] However, in Mississippi the percentage of union membership is approximately 13.2 percent.[60] Therefore, although group legal services are predictably in Mississippi's future, the role played by unions in ushering in such will be less in this State than in other states.

One stumbling block to union group legal services has been Section 302 of the Labor Management Relations Act of 1947[61] which prohibits employer-union jointly-administered trust funds maintained for the purpose of providing legal services.[62] However, a recent enactment[63] has allowed an exception for these jointly-administered trust funds, and the unions may now bargain for such. Consequently, a brisk increase in the number of union group plans is foreseeable. Open panel plans would be ideal from the standpoint of the bar, but unions will more than likely opt for closed panel plans which will give the unions greater control over fees and quality of the services provided. One merely has to examine open panel plans in other professions, such as medicine, to appreciate how costs may rapidly rise out of control. One writer has expressed that observation as follows:

> In light of this experience [of rapidly rising costs under open panel plans], labor organizations, contributing employers, and trustees of fringe benefit trusts probably will not endorse any group legal program unless controls on legal fees are assured which explicitly strip the legal profession of its exclusive power to set and control its own fees.[64]

---

[58] Murphy, *supra* note 1, at 8-10.

[59] *Mississippi Statistical Abstract* 213 (1972).

[60] *Id.*

[61] Pub. L. No. 101, 80th Cong., 1st Sess., 61 Stat. 136 (1947), *as amended* by Pub. L. No. 257, 86th Cong., 1st Sess., 73 Stat. 541 (1959).

[62] However, trust funds administered individually by either an employer *or* a union were not precluded.

[63] Act of August 15, 1973, Pub. L. No. 93-95, 93d Cong., 2d Sess., 87 Stat. 314.

[64] Roberts, *supra* note 10, at 598. However, considering Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973), even the bar does not have that power now.

The Washington State Bar Association has developed a modified closed panel plan for unions which can be eventually converted into an open panel plan. The Washington Bar formed a nonprofit corporation, secured agreements to render services for reduced fees from various lawyers throughout the state, and then contracted with unions to provide those services.[65] The program is now available to 75,000 persons eligible for the usual type of legal services. The following is a portion of the schedule of reduced fees for participants in the program:

Simple Will	$12.50
Personal Injury	20 percent contingent fee
Simple Deed	$10
Contract for Sale of Residential Property	$25[66]

Two other problems facing group and prepaid legal services plans concern taxation and insurance regulation. Presently, tax-exempt status is not available to any group or prepaid plan, to jointly-administered trust funds set up by employer-union agreements,or to a nonprofit corporation formed for the delivery of such services.[67] However, based on previous exemptions granted for health insurance,[68] little difficulty is seen in securing such a change once the impetus for the change has been generated.[69]

Insurance presents a problem in that it is not known whether regulation will be required in the future or what form that regulation may take. A recent survey of state insurance departments was conducted to determine the role of these departments in regulating a prepaid legal services plan.[70] Mississippi was one of 13 states[71] which did not respond to the survey. Despite the absence of cooperation, one generalization from the survey can be made—a state of confusion, stemming from a lack of awareness of the mechanics of a group or prepaid program, exists among the various state departments. It is not presently known in what direction state regulation will proceed, but Samuel Van Pelt, who conducted the survey, concludes that the criteria for state regulation will include: (1) the extent of regulation by other agencies, such as the bar or federal government; and (2) the extent to which prepaid plans are also engaged in indemnification.[72]

---

[65] *Id.* at 600-04.

[66] *Id.*

[67] Int. Rev. Code of 1954, § 501(c) (lists organizations that are eligible for tax exempt status).

[68] *Id.*

[69] For a brief discussion of tax ramifications on group and prepaid legal services see Duffy, *Internal Revenue Code Requirements*, in Practicing Law Institute Handbook on Prepaid Legal Plans 181 (1973); Roberts, *supra* note 10, at 603.

[70] Address by Samuel Van Pelt, Apr. 28, 1972, in ABA National Conference on Prepaid Legal Services 143 (1973).

[71] The other states failing to respond were Texas, South Dakota, Virginia, North Carolina, Washington, Pennsylvania, Maine, Iowa, Kansas, Connecticut, Delaware, and Arizona. *Id.* at 144-55.

A second insurance problem is a lack of statistical data for setting rates. As mentioned earlier one of the purposes of the Shreveport Plan is to provide the needed data, and until it can be adequately provided, insurance companies will be hesitant to enter the field. Despite these insurance problems, some bar associations are moving ahead with legal services insurance programs. For example, the New York State Bar Association is considering a state-wide insurance program of either the Blue Cross-Blue Shield type or the governmentally subsidized type similar to flood insurance.[73] The New York Bar contemplates that the plan will be aimed at individuals rather than groups, will retain the traditional attorney-client relationship, and possibly will be a hybrid of closed and open panels—"closed" in that a panel of lawyers would be selected, and "open" in that any lawyer may perform the services. The plan would pay for services only up to a fixed fee with the client paying the remainder.[74] The Attorney General of New York, Louis J. Lefkowitz, has urged that until such a plan is operational each of the county associations should consider establishing an independent plan "which would reduce the cost of legal services to all subscribers."[75] The same should be urged on all bar associations in Mississippi. At present no formal bar activity to consider establishing a group or prepaid legal services plan for moderate-income groups is underway in Mississippi.

Both the Washington and Shreveport plans have experienced relatively low attorney usage by participating members.[76] However, such may indicate a low "demand" and not necessarily a low "need" by the participants. Barlow Christensen has suggested that there are four factors which affect "demand" for legal services:

---

[72] *Id.* at 156.

[73] Lefkowitz, *supra* note 15, at 151. Flood insurance, provided by private companies, is available at lower rates through a governmental subsidy which in many cases is more than 90 percent of the cost of the insurance. 24 C.F.R. § 1909.2 (1973).

[74] Lefkowitz, *supra* note 15, at 151.

[75] *Id.* at 152.

[76] The Washington Plan had a lawyer utilization of 5 percent as of December, 1972. Roberts, *supra* note 10, at 606. The Shreveport Plan has fared somewhat better with a 34 percent utilization rate. *Summary of Shreveport Plan,* PRACTICING LAW INSTITUTE HANDBOOK ON PREPAID LEGAL SERVICES 277 (1973).

> (1) the quality of the service offered,
> (2) the cost to the client . . . ,
> (3) the accessibility of the service, and
> (4) public knowledge and attitudes about law, lawyers, and lawyers' services.[77]

"Demand" then is seen to be elastic and depending on variables which are determined as much by lawyers as by the public itself. "Demand" can be created. Closed panel plans and techniques of specialization purport to improve the "quality of the service offered" by greater problem familiarization and resulting understanding of those problems. Obviously, if services are coldly rendered or fail to solve all problems involved, "demand" will be lowered. "Cost" and "accessibility" are closely related and are affected by such items as efficiency of operation, office overhead, utilization of forms, economies of specialization, preventive law, ability to recognize legal problems, and methods of payment. But perhaps the most important factor is the fourth factor, the public attitudes toward the legal profession. Public distrust of lawyers has perhaps never been adequately measured, but such has been blamed for low lawyer utilization in the Washington Plan,[78] and such will invariably have the effect of lowering "demand."

It is, therefore, obvious that "demand" can actually be created by positive actions on the part of the members of the legal profession. It would indeed be ironic if the advent of group and prepaid legal services actually increased the volume of business for those members of the bar who initially feared potential loss of business.

V. CONCLUSION

This comment has attempted to confront the members of the organized bar in Mississippi with the need for new delivery systems, with developments in other states, and with a few of the problems which the bar must overcome to ensure the success of new delivery systems. Implicit throughout any study of group and prepaid legal services is the fact that the bar until recently has consistently failed to take the initiative when leadership has been needed most. Fear of losing one's livelihood has been a prime motivating factor in resistance to needed change, but fear that new delivery systems aimed at moderate-income groups will cause members of the bar to lose the "good life" are not justified. Demand for legal services can actually be created by instituting procedures which lower the cost of such services and by regaining the public trust lost over many years of guild-like activity. By taking actions which genuinely benefit the public as a whole rather than selfish interests; by looking at a working man's problems not merely as a legal or non-legal problem but as a human problem immensely important to the individual involved; by enabling moderate-income groups to secure legal services as easily as the wealthy; lawyers will be able to remove public distrust and lose the eternal "shyster" image so long associated with the legal profession. Such actions will have the ultimate effect of actually creating demand, and if demand is created, the bar stands to gain as much as the public. The new demand will help the bar overcome such potential problems as what to do with an overabundant supply of new law school graduates, and will aid in the development of more "no-fault" types of action.

---

[77] B. CHRISTENSEN, *supra* note 3, at 23.

[78] Roberts, *supra* note 10, at 606. Such distrust will not be easily removed in the wake of "Watergate."

In the past when sectors of the public have been unable to secure certain rights or protection deserving of those sectors, the federal government has assisted in securing the needed rights or protection.[79] Therefore, if the bar delays in assisting new developments in legal services for moderate-income groups, the federal government will surely act to provide those services. Already Congressmen have begun to discuss that possibility,[80] and unless the bar is willing to surrender that leadership it must act without unreasonable delay.

Several times it has been stated that in Mississippi there is no formal bar activity centered on some aspect of new delivery systems. But the bar still has the opportunity to assume the leadership in developing those systems. Union activity is low and there are no restless urban masses. The need, however, is already present even if the pressure is not. If the bar does act reasonably soon, its actions will arise out of positive intentions and not out of negative reactions to union or governmental activities.

John W. Beam, Jr.

---

[79] *E.g.*, National Flood Insurance Act of 1968, Pub. L. No. 90-448, 82 Stat. 572.

[80] *Hearings, supra* note 7, at 7.

THE JUDICIAL PHILOSOPHY OF WILLIAM H. REHNQUIST

The confirmation of William H. Rehnquist as a Justice of the United States Supreme Court was anomalous to the political and philosophical environment into which the nomination was thrust.[1] Although the nominee's intellectual ability was generally acknowledged,[2] the nomination was particularly controversial because that intellect had helped hew a philosophy markedly distinct from that possessed by a number of men who passed upon his selection.

An examination of the judicial philosophy of a nominee to the Supreme Court is potentially inaccurate because a Justice's value structure is subject to change with appointment to the Court, or because his prior opinions reveal no clear value structure pattern. In such instances, analysis of the Justice's philosophy is speculative at best.

In the case of Justice Rehnquist, the potential for inaccuracy is greatly reduced. In the preappointment statements of the Justice there are fairly discernible philosophical positions and he has been remarkably faithful in his adherence to them. What follows is an examination of these beliefs.

I. Preappointment Beliefs

Analysis of the Justice's preappointment philosophy is somewhat difficult because a number of material philosophical expressions were made in an advocacy context. As an Assistant Attorney General, Justice Rehnquist was called upon to present the administration's position on a number of issues.[3] Remarks made by the Justice while he was in the advocate's role must be examined in that context. Unless acknowledged as such,[4] any remarks made pursuant to his position as Assistant Attorney General should not be viewed as expressions of personal belief.

---

[1] The closest parallel was the confirmation of Louis D. Brandeis. *Compare* 53 Cong. Rec. 9032 (1916) (remarks of Senator Newlands); 53 Cong. Rec. 9032-84 (1916) (report of the Judiciary Committee and letters addressed to Senators concerning the nominee); 53 Cong. Rec. 6970-73 (1916) (debate indicating the partisan nature of the Brandeis nomination), *with* 117 Cong. Rec. 46188-89 (1971) (remarks of Senator McGovern); 117 Cong. Rec. 45452 (1971) (remarks of Senator Harris). *See also* Grossman & Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 Duke L.J. 557, 572, 576, 581-83; Halper, *Senate Rejection of Supreme Court Nominees*, 22 Drake L. Rev. 102, 112 (1972).

[2] *Hearings on the Nomination of William H. Rehnquist and Lewis F. Powell, Jr. Before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 1-11, 197-200 (1971) [hereinafter cited as *Hearings*]. Typical of the "yes, but" attitude of nomination opponents were remarks by Senator Bayh. *Id.* at 56. For a more critical approach, see the remarks by Joseph Rauh. *Id.* at 304. A similar study by the Ripon Society was introduced into the Congressional Record by Senator Bayh. 117 Cong. Rec. 46168 (1971). Along the same line this *avant-garde* McCarthyism continues while the Justice sits on the Court. *See* Rein, *A Steady Look at the Court*, 5 Bill of Rights J. 3, 14 (1972).

[3] *Rights in Conflict—Reconciling Privacy with the Public's Right to Know—A Panel*, 63 Law Library J. 551 (1970); *Hearings* 64, 78. *See also Hearings on The Independence of*

A. Individual Rights

The Justice's preappointment conduct and words evidence a deference to the concept of minimum societal interference with the individual. This belief was expressed as a part of the larger philosophical concern of the proper role of government in enforcing social policy.

Illustrative was Justice Rehnquist's appearance as a private citizen before a 1964 meeting of the Phoenix City Council. Justice Rehnquist spoke in opposition to a proposed public accomodations ordinance. He argued that society, through the medium of government, should not regulate one's affairs to the extent of telling him with whom he must deal.[5] At the confirmation hearings, Justice Rehnquist, reflecting upon his opposition to the ordinance, stated that his concern proved misplaced by the smooth operation of the ordinance.[6] This attitude is significant in that it indicates that his opposition was based upon pragmatic as well as philosophical grounds. The Justice modified his position relative to his pragmatic concerns; he did not retreat from his philosophical position.

Concern for the proper role of government was evidenced in 1966, when, as Arizona's representative to the National Conference of Commissioners on Uniform State Laws, Justice Rehnquist urged modification of a proposed model act. The act dealt with techniques to remedy discrimination. The Justice objected to two specific provisions of the proposed legislation: an anti-blockbusting section, and a scheme for minority-group employment. The basis of his opposition, again philo-

---

Federal Judges Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 331-50 (1971) (testimony given by the Justice while serving in the Justice Department); *Hearings on Lowering the Voting Age to 18 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 233-49 (1970); Rehnquist, *The Constitutional Issues—Administration Position*, 45 N.Y.U.L. Rev. 628-30, 633 (1970) (presentation by Assistant Attorney General Rehnquist as part of the Hammerskjöld Forum).

[4] *Hearings* 30. The Justice argued that his role in the Justice Department was that of an advocate. He also indicated inferrentially that his advocacy role reflected his personal philosophy. However, the similarity of the two probably should not be overemphasized. *See* 117 Cong. Rec. 45412-13 (1971) (remarks by Senators Proxmire and Bayh).

[5] *Hearings* 305, 306-09. For a critical analysis of this and other preappointment positions see 117 Cong. Rec. 44635-44 (1971) ("Memorandum on the Qualifications of William H. Rehnquist To Be an Associate Justice of the Supreme Court" introduced by Senators Bayh, Hart, Kennedy, Tunney) [hereinafter cited as *Memorandum*].

[6] *Hearings* 69-70.

sophical, was that the matters covered by the sections were essentially private and, therefore, not the proper subject for governmental interference.[7]

The clearest expression of Justice Rehnquist's preappointment position as to individual conduct came in the form of a letter to the editor of a Phoenix newspaper. Although written in the context of a dispute over school policy,[8] the thought expressed is an adequate summation of Justice Rehnquist's views: "We are dedicated to a free society in which each man is equal before the law; but in which each man is accorded maximum freedom of choice in his activities."[9]

A study prepared by the majority of the faculty of the University of Wisconsin School of Law indicated that, on the basis of the foregoing examples, as well as others, Justice Rehnquist lacked sensitivity to minority problems.[10] Such a sweeping generalization is subject to criticism on two grounds. The study was prepared in a partisan atmosphere and for a political purpose.[11] Its objectivity, therefore, is open to serious doubt. But of more significant gravity is the tone of the paper. The thrust of its argument is that because the Justice voiced opposition to specific programs or policies, he was insensitive to minority group problems. The logic of such an argument is gravely defective. It is axiomatic that one could oppose specific governmental actions and at the same time be aware of the problems the actions sought to remedy. The need for specific types of legislation passes with time. Concern for the proper role of government in the affairs of men is always justified.

B. The Rights of the Many

The second component of Justice Rehnquist's preappointment philosophy is a pragmatic deference to societal interests. Expression of this philosophy was not confined to remarks made while in the employ of the government. In 1958, the Justice, then a private attorney, wrote a critical analysis of *Konigsberg v. State Bar of California.*[12] In *Konigsberg*, petitioner had refused to answer questions, before the California State Committee of Bar Examiners, as to his present and past membership in the Communist Party. The Committee refused to certify him to practice law on the grounds that he failed to prove he was of good moral character. The Court held that the petitioner's exclusion from the practice of law violated due process, since the evidence did not rationally support the finding that he failed to prove he was of good moral character.[13] The Justice argued that the Court had been excessive in seeking to protect the rights of a particular political minority's membership. Societal interests had been sacrificed at a time when they should have been given deference by the Court.[14] At the confirmation hearings, although the Justice selected different language to express the thought,[15] the basic belief remained the same.

---

[7] *Memorandum*, 117 CONG. REC. 44635, 44637-38 (1971).

[8] *Hearings* 70-71 (Justice Rehnquist's position). For criticism of this position see *id.* at 309-10. *See also Memorandum*, 117 CONG. REC. 44635, 44639 (1971).

[9] The letter is in the record of the hearings. *Hearings* 309.

[10] *Memorandum*, 117 CONG. REC. 44637 (1971).

[11] 117 CONG. REC. 44635 (1971).

[12] 353 U.S. 252 (1957), *criticized in* Rehnquist, *The Bar Admission Case: A Strange Judicial Aberration*, 44 A.B.A.J. 229 (1958).

Concern for societal rights was most in evidence while the Justice was an Assistant Attorney General. Various situations exemplify his concern.[16] The Justice's preappointment attitude relative to field arrest procedures in the context of a demonstration is illustrative. Criticism of the Government's Viet Nam policy reached its climax with the May Day March on Washington. During the course of the protest, Metropolitan Police arrested a large number of persons. The arrestees were detained prior to being brought before magistrates.[17] This qualified martial law procedure was criticised as a denial of the arrestees' constitutional rights.[18] At the confirmation hearings, the Justice defended the procedure as a pragmatic solution to a difficult problem. He argued that had individualized arrest procedures been followed, police protection would have suffered. The number of protesters necessitated that all available officers be at the scene of the demonstrations.[19] Justice Rehnquist indicated that such circumstances are an important consideration in evaluating the constitutionality of police procedures.[20]

---

[13] 353 U.S. at 267-70.

[14] *The Bar Admission Case, supra* note 12, at 232.

[15] *Hearings* 28-29.

[16] At the hearings Mr. Rehnquist stated:

> I think the language I used was meant to suggest that they [the Court majority in *Konigsburg*] sympathize with the plight of unpopular groups, such as Communist, and I certainly did not mean to suggest that this is an illegitimate sympathy, but I did not feel that sympathy . . . ought to be read into the Constitution.

Id. at 28.

[17] *Hearings* 42-48.

[18] *Id.* At his confirmation hearings, the Justice discussed the procedure in the context of "technical violations of the law." *See id.* at 191-92.

[19] *Id.* at 43-47.

[20] *Id.* Justice Rehnquist carried this concept with him upon his appointment to the Supreme Court. In Cady v. Dombroski, 93 S. Ct. 2523 (1973), the defendant, a Chicago police officer, crashed a rented car into a bridge abutment. The police arrested the defendant for drunken driving and took him to the hospital. The car was towed to a garage. One officer, who had observed that defendant did not have a gun (contrary to a requirement that police officers carry their gun at all times), went back to the car in order

This pragmatic consideration of circumstances was evidenced in another context. Responding to charges that the Government had yielded ground in civil rights enforcement, the Justice, as Assistant Attorney General, argued that the opposite was the case. Through a practical approach to enforcement problems, an approach which recognized the differences inherent in each situation, more had been done than was previously the case.[21]

Justice Rehnquist's preappointment philosophy can best be described as a balance of two, often conflicting, concerns. He advocated maximum freedom of conduct in personal affairs. However, where conflict existed between societal and individual interest, particularly in the criminal justice field, he deferred to the societal interests.

II. JUDICIAL PHILOSOPHY

A. *Criminal Justice*

A review of the Court's 1971-72 term indicates a great philosophical split among the Justices,[22] with Justice Rehnquist generally adhering to his preappointment philosophy, especially in the criminal procedure area.

The initial step in the criminal justice process is often the arrest and subsequent seizure of evidence. The Court has long sought to provide procedures to safeguard the individual's rights during this critical stage.[23] In *Aguilar v. Texas*[24] the Court set down a two-pronged test by which to measure information leading to arrest: (1) there must be a sufficient basis for the information, and (2) the source of the information must be reliable.[25] In *Terry v. Ohio*[26] the Court held that a limited search

---

to find the revolver. The officer searched the trunk and found several items covered with blood. These items led to a subsequent charge of murder. The Court of Appeals for the Seventh Circuit held the search of the rented car was unconstitutional. On certiorari, the United States Supreme Court reversed. The Justice, in writing for the majority, set forth a "reasonableness test" by which to measure police conduct. *Id.* at 713, 717-18. The majority opinion is severely criticised by Justice Brennan in his dissent. *Id.* at 720-22. This opinion, perhaps more than any other, evidences the different values represented on the Court. *See* note 22 *infra.*

[21] Rehnquist, *The Old Order Changeth: The Department of Justice Under John Mitchell*, 12 ARIZ. L. REV. 251, 253 (1970). *See also* J. Osborn, *Paying for Integration*, NEW REPUBLIC, June 6, 1970, at 10; NEWSWEEK, July 27, 1970, at 67; U.S. NEWS & WORLD REPORT, Apr. 20, 1970, at 33; U.S. NEWS & WORLD REPORT, Apr. 6, 1970, at 15.

[22] *The Supreme Court 1971 Term*, 86 HARV. L. REV. 1, 287, 297-306 (1972).

[23] Beck v. Ohio, 379 U.S. 89 (1964); Draper v. United States, 358 U.S. 307 (1959); Giordenello v. United States, 357 U.S. 480 (1958); Nathanson v. United States, 290 U.S. 41 (1933).

[24] 378 U.S. 108 (1964).

[25] *Id.* at 114. *See also* Spinelli v. United States, 394 U.S. 410 (1969), in which an

of a suspect for weapons was permissible when the officer reasonably concluded, in the light of his experience, that criminal activity might be afoot and that the suspect might be armed.

Adams v. Williams[27] afforded the Court the opportunity to apply *Aguilar* to a *Terry* situation. In *Adams*, a previously reliable informant told the police officer that an individual named Williams, who occupied a nearby car, was armed and in the possession of narcotics. Upon investigation the officer made a limited search of Williams' person in accordance with *Terry*. The Court concluded that the subsequent discovery of a pistol in Williams' wasteband constituted sufficient corroboration of the tip as to the narcotics to satisfy the *Aguilar* test. Therefore, there was probable cause for the subsequent search of the car for the narcotics. Speaking for the majority, Justice Rehnquist gave a liberal reading to *Terry*: ". . . [W]hile the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, [citations omitted], the information carried enough indicia of reliability to justify the officer's forcible stop of Williams."[28] Moreover, the rationale of the opinion is deeply rooted in the pragmatic concept that the circumstances should govern the reasonableness of the arrest and search and the officer is in the best position to make that determination.

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape.
>
> . . . [W]e reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person. Informant's tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation.[29]

A liberal reading of case law to support societal interests was also evident in *Schneble v. Florida*.[30] An accused murderer, invoking the

---

unverified tip was inadequate to show probable cause.

[26] 392 U.S. 1 (1968).

[27] 407 U.S. 143 (1972).

[28] *Id.* at 147.

[29] 407 U.S. at 145-47. Justice Marshall, joined by Justice Douglas, dissented, citing Justice Harlan in *Spinelli v. United States* for the proposition that the information obtained from an informer tipster must be generally trustworthy. He argued that the information given to the officer in the instant case failed to satisfy the *Spinelli* requirements. *Id.* at 157.

[30] 405 U.S. 427 (1972).

Bruton rule,[31] sought to invalidate his conviction. Speaking for the majority, Justice Rehnquist limited the applicability of the *Bruton* rule: "The mere finding of a violation of the *Bruton* rule . . . does not automatically require reversal."[32] In the instant case, the co-defendant's confession was of minimal importance in light of the independant evidence of guilt.[33]

Schneble established a new test by which to examine *Bruton*. Where ". . . the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, . . . it is clear beyond a reasonable doubt that the improper use of the admission [under the *Bruton* rule] [is] harmless error."[34]

In *Adams* and *Schneble* Justice Rehnquist, speaking for the majority, interpreted prior case law to support society's interest in effective police action.

B. Statutory and Constitutional Interpretation

In interpreting statutory provisions, the Justice uses a strict construction approach in line with his admitted deference to legislative intent.[35] Illustrative of this is *Gelbard v. United States*.[36] The majority held that a grand jury contempt citation was invalid where the individual's refusal to testify concerned matters which came to the jury's attention via impermissible wiretaps.[37] The majority's rationale was that a contrary holding would subvert the purpose of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[38] Justice Rehnquist's dissent indicates an unwillingness to pass judgment upon legislative purpose. Applying *expressio unius est exclusio alleruis*,[39] the Justice found that the intent of the legislation was to codify then existing procedures.[40] Federal grand jury investigations, he argued, are not adversary proceedings. Congress, therefore, did not intend to require, in such proceedings, a full-scale hearing as to the admissibility of evidence.[41] For the Court to read such a provision into the statute, he stated, would be violative of "the canons of statutory construction traditionally followed by this Court."[42]

---

[31] The rule was developed in Bruton v. United States, 391 U.S. 123 (1968). The essence of the rule is that ". . . where the powerfully incriminating extrajudicial statements of a co-defendant who stands accused side-by-side with the defendant, are deliberately spread before the jury . . . the unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." *Id.* at 135-36. The inability of the defendant to cross-examine the declarant was held to violate the "confrontation clause" of the sixth amendment. *Id.* at 138.

[32] 405 U.S. at 430.

[33] *Id.* at 431.

[34] *Id.* at 430. The Justice's belief that "technical violations of the law" should not be the basis for reversal of trial convictions, *Hearings* 191-92, and his general deference to societal interests provide the philosophical basis for the *Schneble* decision.

The dissent primarily attacked the credibility of the defendant's statements which were suspect because of questionable police conduct: "[W]hen he was first arrested, petitioner denied his guilt. . . . [O]nly after he was subjected to a series of bizarre acts by the police designed to frighten him into making incriminating statements did petitioner 'confess.' "*Id.* at 433-34 (Justices Marshall, Douglas and Brennan dissenting). The dissent reflects a deference to the rights of the accused and would apply *Bruton* strictly. Justice Rehnquist and the majority would defer to societal interests (in the instant case, protection from convicted murders) by applying only *Bruton* to other than "technical violations of the law." *See also* United States v. Russell, 411 U.S. 423 (1973).

[35] *Hearings* 159-61. *See, e.g.,* Mancusi v. Stubbs, 408 U.S. 204 (1972).

[36] 408 U.S. 41 (1972). The companion case was United States v. Egan & Walsh, 408 U.S. 41 (1972) (refusal to testify after being granted immunity).

Justice Rehnquist's opinions dealing with state criminal procedures evidence application of the same considerations he applied in a Federal context: (1) deference to rational state policy; and (2) primary importance placed on historical and legislative purpose.

Ham v. South Carolina[43] involved a defendant's request to have the jury questioned as to racial attitudes. The lower court had found that the defendant could not request the court to ask such questions.[44] Speaking for the majority, Justice Rehnquist reversed holding that such questioning was proper under the 14th amendment:

> Since one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure . . . 'essential demands of fairness' . . . and since a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race . . . we think that the Fourteenth Amendment required

---

[37] 408 U.S. at 51-52.

[38] 18 U.S.C. § 2510-20. This part of the Act establishes requirements for judicial control over interception of communications. *See Hearings* 64-69, 193, for Rehnquist's analysis of the use of wiretaps in criminal investigations.

[39] Expression of one thing is the exclusion of another. As applied to statutory construction, if a statute specifies one exception to a general rule, other exceptions are excluded. Black's Law Dictionary 692 (4th ed. rev. 1968).

[40] 408 U.S. at 73.

[41] *Id.* at 73-75.

[42] *Id.* at 91. Justice Rehnquist's views on statutory construction are remarkably similar to those of the late Justice Frankfurter. Compare Justice Rehnquist's views as expressed in *Gelbard* with Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 545, 546 (1947). *See also* Logio v. United States, 37 L. Ed. 2d 121 (1973); City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); Davis v. United States, 411 U.S. 233 (1973); Laird v. Nelms, 406 U.S. 797 (1972).

[43] 409 U.S. 524 (1973).

[44] *Id.* at 526.

> the judge in this case to interrogate the jurors upon the subject of racial prejudice.[45]

Since prior Court rulings had determined that no rational state policy exists to discriminate on racial grounds,[46] the questioning of the jury on such matters was entirely consistent with the purpose of the 14th amendment.[47]

Justice Rehnquist's dissents follow the same pattern. *Brooks v. Tennessee*[48] involved a state procedural rule which required that a defendant in a criminal case either testify first or remain silent throughout his defense. The majority, looking to *Ferguson v. Georgia*,[49] found the rule to be an infringement of the defendant's due process rights:

> By requiring the accused and his lawyer to make that important choice (whether to have the defendant testify) without an opportunity to evaluate the actual worth of their evidence . . . restricts the defense. . . .[50]

Justice Rehnquist's dissent is based upon two propositions. Since Brooks never took the stand in his own defense, ". . . it is therefore difficult to see how his right to remain silent was in any way infringed by the State."[51] This is in keeping with a proposition often followed by the Justice: in order to have standing to object to a procedural rule, the individual must have exposed himself to that rule.[52] The second reason for dissent is the more philosophical. The Justice argued that the effect of the majority ruling is to give the defense counsel a star role in the trial—a role which historically has not been his.[53] The policy behind the rule, he argued, was to insure truthful testimony at trial, and therefore, the rule constituted a valid exercise of state power.[54]

---

[45] *Id.* at 526-27.

[46] Hunter v. Erikson, 393 U.S. 385 (1969); Lee v. Washington, 390 U.S. 333 (1968); Loving v. Virginia, 388 U.S. 1 (1967); Tancill v. Woolls, 379 U.S. 19 (1964) (per curiam); Anderson v. Martin, 375 U.S. 399 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954).

[47] For other examples of Justice Rehnquist's interpretation of the 14th amendment see Roe v. Wade, 410 U.S. 113, 117 (1973) (dissent); Furman v. Georgia, 408 U.S. 238, 465 (1972) (dissent); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 177 (1972) (dissent); Cruz v. Beto, 405 U.S. 319, 323, 326 (1972); Loper v. Beto, 405 U.S. 473, 497 (1972).

[48] 406 U.S. 605 (1972).

[49] 365 U.S. 570 (1961).

[50] 406 U.S. 605, 612 (1972).

[51] *Id.* at 617.

[52] This strict standing theory is applied in several of the Justice's opinions: Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Andrews v. Louisville & Nashville R.R., 406 U.S. 320 (1972); Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972).

[53] 406 U.S. at 618.

[54] *Id.* at 619-20.

C. Adherence to Precedent

Perhaps the clearest expression of the Justice's deference to precedent came in *Strait v. Laird*.[55] Petitioner, an army reserve officer, sought a writ of habeas corpus after being denied conscientious objector status. The federal district court concluded that it lacked jurisdiction because Strait's superior officers were nonresident's of the court's district. The Court reversed, holding that petitioner's custodian, the commanding officer in Indiana, by operating through officers in California in processing his claim, was present in California for the limited purposes of habeas corpus jurisdiction.[56] Justice Rehnquist's dissent is, as with other cases, two-fold.[57] As to the facts, he argued that Strait's contacts with the Army were with his superiors in Indiana. The in-state officers served merely as conduits for the forwarding of information.[58]

Arguing in a broader historical context, the Justice stated that the relief of habeas corpus has traditionally been used sparingly. It is limited to situations in which one is held either in violation of the Constitution, laws or treaties of the Republic, or by someone acting under the color of federal authority or in violation of the Constitution or laws or treaties of the nation.[59] In the instant case the Justice argued that the ". . . well-established limitations upon habeas corpus in military cases,[60] and the . . . well-established restriction upon reviewing the administration of the armed services . . ."[61] precluded the Court from exercising its jurisdiction. Since petitioner had volunteered for service and the law authorizing the Army Reserve was legitimate, the Court should inquire no further as to an administrative procedure.[62] The case at bar did not meet the standards for granting the writ.

---

[55] 406 U.S. 341 (1972).

[56] *Id.* at 345.

[57] *See, e.g.,* Roe v. Wade, 410 U.S. 113, 171 (1973); Adams v. Williams, 407 U.S. 143 (1972); Brooks v. Tennessee, 406 U.S. 605, 617 (1972).

[58] 406 U.S. at 347, 348. There was disagreement within the Court as to the effect of the decision on Schlanger v. Seamans, 401 U.S. 487 (1971). The majority distinguished *Schlanger* on the grounds that the factual situations were not similar. In *Strait* the residence of the serviceman was permanent, whereas in *Schlanger* the residence was temporary. Also, in *Schlanger*, the majority argued, the serviceman was neither supervised by nor reporting to anyone within the court's jurisdiction. 406 U.S. at 343. Justice Rehnquist argued that such a distinction effectively destroyed *Schlanger* as case law. *Id.* at 346. In contrast to *Schlanger*, where societal interests are paramount the Justice favors a liberal construction of prior case law.Adams v. Williams, 407 U.S. 143 (1972) (dissent); Schneble v. Florida, 405 U.S. 427 (1972).

[59] 406 U.S. at 353-55. Other opinions by Justice Rehnquist also evidence a strict attitude as to the use of the writ: Tollett v. Henderson, 411 U.S. 258 (1973); Davis v. United States, 411 U.S. 233 (1973); Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973); Loper v. Beto, 405 U.S. 473, 497 (1972).

[60] *See, e.g.,* Burns v. Wilson, 346 U.S. 137 (1953).

[61] 406 U.S. at 352-53.

D. Society and the Individual

1. Business Regulation

Justice Rehnquist's philosophy on governmental regulation of business is a blend of his deference to societal interests, characteristic of his criminal justice approach, and the maximum-freedom concept advanced in his 1967 letter to the editor of a Phoenix newspaper.[63]

NLRB v. Burns International Security Services, Inc.[64] represents the "maximum-freedom" philosophy. Burns was the successful bidder on a plant security contract. The majority held that Burns was bound to honor a 3-year collective bargaining agreement agreed to by its predecessor at the job site. Justice Rehnquist dissented on two grounds. Since Burns had replaced some of the former security agency's personnel with its own, it was impossible to determine if the majority of Burns' employees were the same majority which previously voted for the union.[65] This represented the pragmatic approach which runs through the Justice's opinions. The Justice dissented on philosophical grounds as well. Arguing that the "successor doctrine"[66] had no application to the instant case, the Justice stated: "I believe that a careful analysis of the . . . concept of successorship indicates that important rights of both the employee and the employer to independently order their own affairs are sacrificed needlessly by the application of that doctrine to this case."[67] Although the decision of the majority might produce a sort of "industrial peace," the Justice argued, the result is too high a price to pay:

> I am unwilling to follow the Board [National Labor Relations Board] this far down the successorship road, since I believe to do so would substantially undercut the principle of free choice of bargining representatives by the employees and designation of the appropriate bargining unit by the Board that are guaranteed by the Act.[68]

Deference to societal interests, the other component of the Justice's business regulation philosophy was evidenced by his majority opinion in *United States v. Allegheny-Ludlum Steel Corp.*[69] The issue was whether the Interstate Commerce Commission's actions in formulating regulations for the efficient transfer of railroad freight cars were proper under section 533 of the Administrative Procedure Act.[70] The Justice held that the Commission's actions were proper. He found that the Commission was merely giving force to an informal arrangement worked out by the railroads themselves.[71] Moreover, the Commission had broad powers in the regulation of railroads because of the general societal interest in a smooth running rail freight system. The nation, as a whole, he argued, benefited from an efficient rail freight system. Therefore, the public interest overrode the private interest of the railroads.[72] *NLRB v. Burns International Security Services, Inc.*, on the other hand involved a localized labor dispute. In such cases, it would appear that the societal interests are not great enough to warrant the abrogation of individual freedom of action.

---

[62] *Id.* at 353.

[63] Found in *Hearings* 309.

[64] 406 U.S. 272 (1972). The Justice uses the same dissent in United States v. Falstaff Brewing Corp., 410 U.S. 526, 572 (1973) wherein the Justice argues that corporate growth alone is not an antitrust violation.

[65] 406 U.S. at 297.

[66] This doctrine requires that the successor employer bargain with representatives of the employees of his predecessor. *Id.* at 299-300.

[67] *Id.* at 299.

[68] *Id.* at 310.

2. Welfare

The extent to which society provides economic assistance to those who need help has concerned the nation for a number of years. Initially, the Court was unwilling to approve wide-scale federal assistance.[73] Since that time, the Court has drastically changed its attitude.[74] Now, a third attitude is evolving on the Court.

Typical of this new approach is *Jefferson v. Hackney*.[75] Under *King v. Smith*[76] states are given wide latitude in the administration of welfare. Texas, exercising this power, utilized a system whereby all welfare funds were put into a common revenue pool. From it, the State distributed welfare payments on a percentage reduction basis. Since the State operated under a constitutional limitation on the amount of welfare allowed, the effect of the system was to provide fewer funds to "Aid to Families with Dependent Children" recipients than they normally would have received.[77] Speaking for the majority in *Jefferson*, Justice Rehnquist held that the Texas plan was not "invidious or irrational."[78] The State can determine that certain groups of persons are in greater need of economic assistance than others.[79] The plan was not violative of the 14th amendment in that states are permitted wide latitude in the administration of welfare programs. Applying the traditional standard of review, the Court held that the variation in percentages was rationally related to the purposes of the separate welfare programs.[80] Under *Dandrige v. Williams*,[81] said Justice Rehnquist ". . . the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."[82]

---

[69] 406 U.S. 742 (1972). Similar reasoning motivated Justice Rehnquist's opinions in United States v. Florida E. Coast Ry., 410 U.S. 224 (1973); and First Nat'l Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). There must be, however, a balancing of societal and individual interests. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 480 (1973) (dissent).

[70] 5 U.S.C. § 551 *et seq.*; 406 U.S. at 742-44.

[71] 406 U.S. at 743.

[72] In United States v. Enmons, 410 U.S. 396, 413 (1973), Justice Rehnquist joined with Justice Douglas in dissent. The issue of the case was whether the use of violence is permissible in order to achieve legitimate union goals. Justice Rehnquist dissented on the grounds that there is an overriding societal interest in preventing such violence.

[73] *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936); Schechter Poultry Co. v. United States, 295 U.S. 495 (1935).

[74] *See, e.g.*, Wyman v. Lopez, 329 F. Supp. 483 (W.D.N.Y. 1971), *aff'd*, 404 U.S. 1055 (1972).

[75] 406 U.S. 535 (1972).

[76] 392 U.S. 309, 318, 319 (1968).

Justice Harlan's rejection of the majority's logic in *Levy v. Louisiana*[83] is echoed by Justice Rehnquist in his lone dissent in *Weber v. Aetna Casualty & Surety Co.*[84] The majority held, based upon *Levy*, that a state prohibition against illegitimate children collecting death benefits under workman's compensation was "impermissible discrimination."[85] Citing *Glona v. American Guarantee & Liability Insurance Co.*,[86] the Court found no "possible rationale basis" for the belief that the mother would benefit if the children were allowed to collect the benefits.[87]

---

[77] Under the Texas plan, the welfare department adopted a method of percentage grants. "[T]he State first computes the monetary needs of individuals eligible for relief under each of the federally aided categorical assistance programs. Then, since the constitutional ceiling on welfare is insufficient to bring each recipient up to this full standard of need, the State applies a percentage reduction factor in order to arrive at a reduced standard of need in each category that the State can guarantee." 406 U.S. at 537. A lower percentage reduction factor was applied to AFDC than to other programs.

[78] 406 U.S. at 549.

[79] *Id.* at 545.

[80] *Id.* at 549.

[81] 397 U.S. 471, 487 (1970).

[82] 406 U.S. at 551.

[83] 391 U.S. 68 (1968).

[84] 406 U.S. 164 (1972). *See also* United States Dep't of Agriculture v. Murry, 93 S. Ct. 2832, 2840-42 (1973); United States Dep't. of Agriculture v. Moreno, 93 S. Ct. 2821, 2831-32 (1973); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619, 621 (1973).

[85] 406 U.S. at 173.

[86] 391 U.S. 73 (1968).

[87] 406 U.S. at 173.

Justice Rehnquist felt *Levy* was a case ripe for reexamination because it had not survived the test of time.[88] Justice Rehnquist dissented in *Weber* arguing that the majority should have followed the position espoused by Justice Harlan in *Levy*.[89] The primary thrust of the dissent is devoted to an analysis of the 14th amendment as it relates to welfare cases. The Justice argued that the amendment was designed to deal only with racial classifications.[90] Economic and social legislation should not be examined in terms of the 14th amendment, for such an approach is ". . . devoid . . . of any historical or textual support in the language of the equal protection clause . . . . [I]t leaves to the Justices of this Court the determination of what are, and what are not, 'fundamental personal rights.' "[91]

The Justice's approach was but another application of strict reading of legislative intent. The Congress passed and the states ratified the 14th amendment for a particular purpose, and that purpose is dealing with racial discrimination.[92] The call for judicial restraint, although not as critical as in other cases,[93] nevertheless parallels Justices Frankfurter's and Harlan's approach to social policy.[94]

3. First Amendment Rights

Freedom of speech has traditionally been viewed as fundamental to a free society.[95] Restrictions on that freedom, therefore, are viewed as suspect.[96] *Healy v. James*[97] brought to the Court's attention the conflict between freedom of speech and effective college administration. A local chapter of the Students for a Democratic Society was denied use of the college's facilities. The Court found that the college administration's actions effectively denied the petitioner's first amendment rights.[98] Therefore, the administration bore the burden of justifying the denial.[99] Since the lower courts had misapplied the law, the case was remanded for a hearing consistent with the Court's decision.[100] Justice Rehnquist concurred in the result:

---

[88] *Hearings* 138. An opinion similar to *Weber* in terms of its candor is Gosa v. Mayden, 93 S. Ct. 2926 (1973).

[89] 406 U.S. at 182-83.

[90] *Id.* at 178-81.

[91] *Id.* at 179. *See also In re Application of Fre Le Poole Griffiths for Admission to the Bar*, 93 S. Ct. 2851, 2861 (1973) (dissent), which provides another example of the Justice's interpretation of the 14th amendment. *See also* Sugarman v. Dougale, 93 S. Ct. 2851 (1973).

[92] 406 U.S. at 178-79.

[93] *See, e.g.,* Grubbs v. General Electric, 405 U.S. 699 (1972).

[94] *See* Levy v. Louisiana, 391 U.S. 68, 76, 80-82 (1968) (Justice Harlan); Baker v. Carr, 369 U.S. 186, 266 (1962) (Justice Frankfurter dissenting). Both opinions prescribe limited governmental interference with social affairs.

[95] Fundamental but not absolute. Justice Rehnquist's deference to society is similar to Justice Holmes' attitude as expressed in Schenck v. United States, 249 U.S. 47, 52 (1919).

[96] *See, e.g.,* Kunz v. New York, 340 U.S. 290 (1951); Lovell v. Griffin, 303 U.S. 444 (1938). Restrictions on free speech were sanctioned in Near v. Minnesota, 283 U.S. 697 (1931). Justice Rehnquist discussed *Near* at his confirmation hearings. *Hearings* 38-39.

[97] 408 U.S. 169 (1972). For an overview of the problems involved in similar situations see Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

> While I do not subscribe to some of the language in the Court's opinion, I concur in the result. . . . As I understand the Court's holding, the case is sent back for reconsideration because respondent may not have made it sufficiently clear to petitioner that the decision as to recognition would be critically influenced by petitioners' willingness to agree in advance to abide by reasonable regulations promulgated by the college.[101]

The reasoning is clear. The Justice is deferring to societal interests in the same manner as he did in dealing with business regulations. Society has a clear stake in the effective and orderly administration of its institutions of higher learning. This interest outweighs the individual interest in exercising freedom of speech. Society, through the government as college administrator, ". . . may impose upon . . . students reasonable regulations that would be impermissible if imposed by the government upon all citizens."[102]

Circumstances, as well as societal interests, were examined in another dissent. The majority, in *Flower v. United States*,[103] held that when a military base is generally open to civilian traffic, the base commander effectively inhibits freedom of speech when, in order to curtail distribution of propaganda material, he prohibits civilians from using an otherwise unrestricted path.[104] Justice Rehnquist's dissent suggested that the effective operation of a military base overrides the mere fact that the base is open to civilian traffic.[105] The Justice's opinion is reflective of a pragmatic approach to the resolution of Constitutional problems, an approach used prior to appointment[106] and, in other contexts, while sitting on the Court.[107]

---

[98] 408 U.S. at 181.

[99] *Id.* at 184.

[100] *Id.* at 194.

[101] *Id.* at 201. Justice Rehnquist's philosophy of limited freedom of speech is similar to the dissent by Justice Black in Brown v. Louisiana, 383 U.S. 131, 151 (1966). *See also* Rosenfeld v. New Jersey, 408 U.S. 901, 909 (1972) (Justice Rehnquist dissenting).

[102] 408 U.S. at 203. This same position was taken by the Justice in his dissent in Papish v. Board of Curators of the University of Missouri, 410 U.S. 667, 673, 676-77 (1973).

[103] 407 U.S. 197 (1972).

[104] *Id.* at 198.

[105] *Id.* at 200-01. In addition, the Justice raised a procedural argument. Flower could have argued his case in a separate district court proceeding under Dash v. Commanding General, 429 F.2d 427 (4th Cir. 1970). 407 U.S. at 201.

4. Freedom to Conduct One's Own Business

Prior to June 12, 1972, the Court was engaged in a continual effort to find constitutional justifications for federal intervention in business affairs to insure equal treatment[108] regardless of race. Such judicial efforts were not without dissent.[109] In the spirit of those dissents, the Court decided *Moose Lodge No. 107 v. Irvis*.[110] The case presented a classic question of how far the government may intervene in private affairs to prevent racial discrimination. Irvis contended that the Moose Lodge's refusal to serve him while a guest of a member was a denial of his equal protection rights and that the State, through its alcoholic beverage licensing practices, was supporting the discrimination.[111] Justice Rehnquist, speaking for the majority, rejected appellee's claim on two grounds. First, on the issue of standing, appellee did not have standing ". . . to litigate a constitutional claim arising out of Moose Lodge's membership practices. . . ."[112] In reviewing the equal protection argument, the Justice concluded that since the Moose Lodge was a private club, and not related to public agencies in any form, it could discriminate if it chose to.[113] The claim of state involvement via the licensing practices was rejected. The Justice refused to make the argumentative leap from the holding of *Burton v. Wilmington Parking Authority*[114] to a determination that a state regulation, such as that pertaining to liquor licenses, automatically involved the State in discrimination practices.[115]

---

[106] This attitude was most evident in his approach toward field arrest procedures. *See* note 19 *supra*.

[107] *See* Cady v. Dombroski, 93 S. Ct. 2523 (1973); Cruz v. Beto, 405 U.S. 319 (1972).

[108] *See, e.g.*, Daniel v. Paul, 395 U.S. 298 (1969); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Boynton v. Virginia, 364 U.S. 454 (1960). *See also* Pollak, *The Supreme Court and the States: Reflections on Boynton v. Virginia*, 49 Calif. L. Rev. 15 (1961).

[109] *See, e.g.*, Daniel v. Paul, 395 U.S. 298, 309 (1969) (Justice Black dissenting). In Boynton v. Virginia, 364 U.S. 454, 464 (1960), Justice Whittaker dissented on the ground that no evidence was presented which connected the restaurant in question with the interstate carrier. This "connection" test was followed by Justice Rehnquist in Jefferson v. Hackney, 401 U.S. 991 (1971) and in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[110] 407 U.S. 163 (1972).

[111] *Id.* at 165.

[112] *Id.* at 171. Justice Rehnquist distinguished the standing cases cited by the appellee, Flast v. Cohen, 392 U.S. 83 (1968), and Law Students Research Council v. Wadmond, 401 U.S. 154 (1971), on the basis that those cases involved first amendment rights. The doctrine represented by those cases "has not been applied to constitutional litigation in areas other than those relating to the First Amendment." 407 U.S. at 168. This strict adherence to prior case law is in accordance with his prior decisions. *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284 (1973); Ham v. South Carolina, 409 U.S. 524 (1973); Brooks v. Tennessee, 406 U.S. 605, 617 (1964).

[113] 407 U.S. at 171.

The opinion was consistent with the Justice's preappointment views. As a private citizen, the Justice was unwilling to support certain types of governmental interference in private business affairs in order to secure or insure remedial social action.[116] *Moose Lodge* is capable of being construed too liberally. The case must be read in the context of its facts—private action of a non-criminal character. Where actions of a criminal nature are involved, Justice Rehnquist defers to societal interests. In *California v. LaRue*,[117] the Court upheld the authority of a state regulatory agency to deny liquor licenses to clubs providing a particular type of entertainment. Police records evidenced a particularly high rate of crime in the areas surrounding the clubs.[118]

E. The Role of the Judiciary in American Society

1. Judicial Review

Traditionally there have been two schools of thought as to the role of the judiciary in American society, one espousing active judicial review and the other restrained judicial review.[119] Justice Rehnquist is an advocate of the latter. In *Colegrove v. Green*[120] Justice Frankfurter admonished the judiciary that questions of legislative reapportionment were political and therefore outside the scope of judicial expertise. The Court in *Baker v. Carr*,[121] and other reapportionment decisions,[122] turned its back on Justice Frankfurter's opinion. The majority's zeal in deciding reapportionment questions reached its highwater mark when, in *Lucas v. Colorado General Assembly*,[123] the Court invalidated a plebiscite because the effect of the vote was to create a state legislature composed in a fashion which deferred to population and political subdivision boundary lines. The majority decisions were accompanied by vigorous dissents.[124] Justice Rehnquist's views parallel those of these dissents. In *Mahan v. Howell*[125] the Justice, writing for a new Court majority, approved a plan whereby Virginia's legislature was reapportioned on a population and political subdivision basis. The opinion is characteristic of the Justice's style. Applying *Kirkpatrick v. Preisler*,[126] the district court had concluded that a 16.4 percent variation from the ideal was sufficient to condemn the statute under the "one person, one vote" doctrine. In reversing, *Kirkpatrick* was rejected as precedent because it dealt with state reapportionment statutes for *federal* congressional districts, and not *state* legislative reapportionment.[127] The Justice refused to apply the more stringent standards of *Kirkpatrick* in a determination of a state legislative redistricting plan.[128]

---

[114] 365 U.S. 715 (1961). The case was used by the appellee as a precedent in support of his contention that the state was a partner to the impermissible discrimination.

[115] Justice Rehnquist's position is an application of the "connection" test established in Boynton v. Virginia, 364 U.S. 454 (1960). *See* note 109 *supra*. This test was also applied in Keyes v. Denver, 93 S. Ct. 2686, 2720, 2724 (1973).

[116] *See* note 5 *supra*. There is a difference of opinion on the Justice's personal racial views. A memorandum prepared by the Justice while serving as a clerk to Justice Jackson was used as evidence of personal racial bias. 117 CONG. REC. 45815 (1971) (remarks by Senator Brooke). This theory is repudiated by Grossman, *supra* note 1, at 526.

[117] 409 U.S. 109 (1972).

[118] *Id.* at 111. *LaRue* was followed by City of Kenosha v. Bruno, 93 S. Ct. 2222 (1973). In both cases the Justice liberally interpreted the 21st amendment. In light of the restrictive interpretation of the 14th amendment (see notes 45, 96 *supra*) there might appear to be a contradiction. Yet such is not the case. The 14th amendment was designed for a limited purpose while the 21st amendment was intended to be of a broader scope. The Justice was merely allowing a state to regulate the sale of alcoholic beverages pursuant to the 21st amendment.

[119] G. SCHUBERT, CONSTITUTIONAL POLITICS 189-90 (1960).

[120] 328 U.S. 549 (1946).

[121] 369 U.S. 186 (1962).

[122] Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Swann v. Adams, 385 U.S. 440 (1967);

The Justice's call for judicial restraint has not been limited to the question of reapportionment. The most frank expressions of displeasure at majority self-indulgence came in *Furman v. Georgia*[129] and *Roe v. Wade*.[130]

Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964).

[123] 377 U.S. 713, 744, 748 (1964). Justice Stewart's dissent is similar to that of Justice Rehnquist's in Furman v. Georgia, 408 U.S. 238 (1972).

[124] *See, e.g.*, Swann v. Adams, 385 U.S. 440, 447 (1966); Reynolds v. Sims, 377 U.S. 533, 589 (1964); Wesberry v. Sanders, 376 U.S. 1, 20 (1964).

[125] 410 U.S. 315 (1973). *See also* Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973); Sayler Lake Co. v. Tulane Lake Basin Water Storage Dist., 410 U.S. 719 (1973); Cousins v. Wigoda, 409 U.S. 1201 (1972); Ely v. Klahr, 403 U.S. 108 (1971); Lo Frisco v. Schaffer, 341 F. Supp. 743 (D. Conn.), *aff'd*, 409 U.S. 972 (1972). In *Sayler Lake Company* Justice Rehnquist cites Williams v. Rhodes, 393 U.S. 23 (1968), for the proposition that considerations of "fact and circumstance" behind the law must be examined. In *Sayler*, the district was set up for a specific purpose beneficial to a specific number of persons. Rehnquist argues that any extention of the franchise beyond the original plan would be improper. 410 U.S. at 725. *See also* Republican State Central Comm'n v. Ripon Society, 409 U.S. 1222 (1972), for the Justice's "political question" views.

[126] 394 U.S. 526 (1969).

[127] "The express purpose of [*Kirkpatrick*] was to elucidate the standard first announced in the holding of Wesberry v. Sanders [citations ommitted] that, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a *congressional* election is to be worth as much as another's." Mann v. Howell, 410 U.S. 315, 320 (1973).

[128] *Id.* at 324.

[129] 408 U.S. 238 (1972).

[130] 410 U.S. 113 (1973).

Furman involved the constitutionality of the death penalty. The majority, in a per curiam opinion, held the death penalty to be, in some cases, violative of the 14th amendment, in that the imposition and carrying out of the penalty would be cruel and unusual.[131] Justice Rehnquist's dissent was highly critical of the majority. Deferring to the other dissents' analysis of the specific factual situations in the cases,[132] his dissent dwelled on philosophical considerations. Citing the *Federalist Papers*, the Justice argued that in a democratic society sovereign power rests with the people, and that the legislature is the mechanism whereby popular will becomes law. In the instant case, he argued, the legislatures of several states enacted death penalty statutes. The federal judiciary has no moral authority to substitute its values for the will of the people, as expressed through their legislatures.[133] In speaking directly to the concepts of judicial restraint, Justice Rehnquist argued that the federal judiciary occupies a unique position, and because of its particular character, those who sit as judges should heed the admonition of Justice Stone: "[W]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."[134] Justice Rehnquist echoes Justice Stone in calling the majority to task in *Furman*:

> The most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been granted a roving commission either by the Founding Fathers or by the Framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court.[135]

Roe v. Wade[136] involved state restrictions on abortion. In an opinion by Justice Blackmun, expressing the views of seven members of the Court, it was held that a woman has a right, though not absolute, to determine whether or not to terminate her pregnancy. This right is founded in the 14th amendment's concept of personal liberty and restriction upon state action.[137] Justice Rehnquist's dissent in *Roe* is equally forceful:

---

[131] 408 U.S. at 239-40.

[132] *See, e.g., id.* at 375.

[133] *Id.* at 467.

[134] *Id.* at 467, *quoting* United States v. Butler, 297 U.S. 1, 78-79 (1935) (Justice Stone dissenting).

[135] 408 U.S. at 467. *See Hearings, supra* note 2, at 160, for Justice Rehnquist's views on the effects of subjective jurisprudence. The Justice's attitude is similar to Justice Black's as developed in *A Constitutional Faith—Joseph S. Carpentier Lectures at Columbia Law School* 11-22 (1968). *See also* JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 68-70 (1955).

[136] 410 U.S. 113 (1973).

> The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to legislative judgment than to a judicial one.[138]

Looking to the intent of the 14th amendment, the Justice argued that the majority has eschewed the purpose of the amendment.[139] The net effect of the Court's decision, he argued, is to leave "this area of the law more confused than it [the Court] found it."[140]

2. When to Withdraw From the Decision-Making Process

In *Laird v. Tatum*[141] the Court, in a five-to-four decision, decided that army data computer banks did not have a chilling effect on an individual's freedom of speech.[142] Almost immediately a petition for rehearing was addressed to the Court.[143] In addition, a motion to recuse, nunc pro tunc, was presented to Justice Rehnquist, because prior to his appointment to the Supreme Court, he had appeared as an expert witness for the Justice Department before Senate hearings on the subject matter of the case.[144] Respondents sought to apply 28 U.S.C. § 455, part of which requires disqualification of a Justice or judge ". . . in any case in which he has a substantial interest, has been of counsel, is or has been a material witness. . . ."[145] Justice Rehnquist took the unusual step of writing a memorandum in reply.[146] That document reflects particular characteristics of the Justice. The Justice began pragmatically by differentiating between his position at the Justice Department and actual involvement with the preparation of the *Tatum* case.[147] He cited cases where he did participate while with the Justice Department, and, therefore, later disqualified himself from consideration of the cases.[148] Moreover, the Justice pointed out that historically other Justices, more involved with cases than he was with *Tatum*, participated in Supreme Court review of those cases.[149]

---

[137] *Id.* at 153.

[138] *Id.* at 173.

[139] *Id.* This strict reading of the 14th amendment is consistent with the Justice's opinion in Ham v. South Carolina, 409 U.S. 524 (1973).

[140] 410 U.S. 113, 173 (1973).

[141] 408 U.S. 1 (1972).

[142] The Army, in response to the civilian disorders in 1967, instituted a computerized intelligence system for the surveillance of civilian political activity. Because the principal source of information was the news media and publications of general circulation, the plaintiffs filed a class action, claiming that the mere existence and operation of such a system imposed a chilling effect on the exercise of their first amendment rights. *Id.* at 4-5, 9-10.

[143] 409 U.S. 901 (1972) (rehearing denied).

[144] 409 U.S. 824 (1972).

[145] *Id.* at 825.

[146] 409 U.S. 824 (1972).

The Justice's pragmatic bent is evidenced by his analysis of the possible effect of non-participation, where the decision to abstain is optional:

> . . . [T]he disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not "bending over backwards" in order to deem one's self disqualified.[150]

The Justice's memorandum reflects the same basic attitude evidenced in the criminal law field. By strictly construing statutory language the Justice preserved society's interest in having settled principles of law.

III. Conclusion

The poet Kipling once wrote that: "East is east, and west is west, and never the twain shall meet."[151] Given the nature of the Supreme Court, nine men of independent judgment, and given Justice Rehnquist's vigorous exposition of his interpretation of the Constitution, it might appear that Kipling's admonition has special meaning to the present Court. But such is not the case. Justice Rehnquist is the historical twain between the Court's classic conservatives and its vigorous liberals. With Justices Harlan and Frankfurter, he shares a deep concern over the proper role of government in the affairs of men. And with

---

[147] *Id.* at 826-28. *See Hearings, supra* note 2, at 49, 50, 60, 73-74, 141-42, for a discussion of the disqualification problem.

[148] 409 U.S. 824, 828-29 (1972). Those cases were United States v. United States Dist. Ct., 407 U.S. 297 (1972), and S & E Contractors v. United States, 406 U.S. 1 (1972).

[149] 409 U.S. at 830-32.

[150] *Id.* at 837-38. Comment, 73 Colum. L. Rev. 106 (1973), questions the propriety of the Justice's participation. The author suggests that the Justice should have waited until a case with less personal involvement came up. *Id.* at 124. However, the Justice was not personally involved in this case. 409 U.S. at 826-27.

[151] R. Kipling, *The Ballad of East & West,* Rudyard Kipling's Verse 233 (1940).

Justice Douglas, he shares a communion of candor; for both men are romantic figures—"Paladins" in the garb of judges; men quite willing to tell their Brothers the error, as they see it, of a majority position.[152]

Speculative conclusions concerning trends of future decisions are often proved false by time. Notwithstanding that fact, I think it is accurate to suggest that Justice Rehnquist will continue to give deference to the whole of men when a conflict exists between one and the many. And where no conflict exists, he will speak for maximum freedom of action. The clearest expression of the Justice's attitude came in response to a question as to how he would conduct himself as a Justice of the United States:

> [F]idelity to the Constitution and let the chips fall where they may.[153]

John Riemenschneider

---

[152] *Compare* Justice Douglas' dissent to Sierra Club v. Morton, 405 U.S. 727 (1972), *with* Justice Rehnquist's pleas for judicial restraint in *Furman* and *Roe.*

[153] *Hearings, supra* note 2, at 156.

RECENT DECISIONS

Constitutional Law—Private Schools' Admissions Policies Based Solely on Race Violate Right to Contract Guaranteed by Section 1981

Two Black children brought suit in Federal District Court of the Eastern District of Virginia against two all-White private schools[1] seeking compensatory and punitive damages, and injunctive relief for the schools' refusal to admit them.[2] The two private schools operated entirely on funds derived from student tuition and received neither federal nor state assistance. Plaintiffs contended that the denial of admission was based solely on race and was therefore a violation of 42 U.S.C. § 1981.[3] Defendants contended that the Black students' right to make and enforce contracts did not apply to admission to entirely self-sustaining private schools. The Federal District Court, *held*, a private school's refusal to admit Black students solely on the basis of race is a violation of the students' equal rights to make and enforce contracts guaranteed by 42 U.S.C. § 1981 (1970).[4] *Gonzales v. Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200 (E.D. Va. 1973).

Sections 1981 and 1982[5] were originally part of Section 1 of the Civil Rights Act of 1866.[6] For over 100 years these statutes were held to apply only to actions under color of state law and not to private acts of discrimination.[7] In 1968, however, the Supreme Court in *Jones v. Alfred H. Mayer Co.*[8] held that section 1982 did apply to private acts of discrimination against Blacks in the sale of property.[9] The Court stated that the 13th amendment[10] provided Congress with the constitutional authority to restrict such private acts of discrimination, the very "badges and incidents of slavery."[11] *Mayer* dealt specifically with discrimination in the sale of property prohibited by section 1982. The *Mayer* rationale, however, was soon extended to discrimination in the making of contracts.[12] The same year that *Mayer* was decided a union's refusal to admit a Black to membership was held to be a denial of his right to contract guaranteed by section 1981.[13] The court reasoned that union membership was often a prerequisite for employment and that denial of such membership could ultimately result in a

---

[1] The Southern Independent School Association, claiming to represent similar all-White private schools in seven states, intervened in the suit against one of the schools. The court consolidated all of the suits, but it was made clear that this was not a class action and any decision would be binding only on the named parties and the schools that made up the intervenor.

[2] The children's parents had applied to the schools in response to ads in the "yellow pages" of the telephone directory.

[3] 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every other kind, and to no other.

[4] Although injunctive relief and compensatory damages were awarded, punitive damages were not. The court stated:

> While the defendants' acts have here been declared improper, insofar as the court can determine similar acts have not heretofore been so declared. Accordingly the defendants cannot be said to have acted recklessly or wilfully in disregard of clear existing laws.

Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200, 1205 at n.5 (E.D. Va. 1973).

[5] 42 U.S.C. § 1982 provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

[6] Section 1 of the Civil Rights Act of 1866, Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. Section 1 states in pertinent part:

> [A]ll . . . citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . .

[7] During this time civil rights cases were brought under the equal protection clause of the 14th amendment which applied only to state action. Hurd v. Hodge, 334 U.S. 24 (1948); Hodges v. United States, 203 U.S. 1 (1906); Civil Rights Cases, 109 U.S. 3 (1883); Virginia v. Rives, 100 U.S. 313 (1879). *But see* United States v. Morris, 125 F. 322 (E.D. Ark. 1903). *See generally* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439-40 n.11 (1973).

[8] 392 U.S. 409 (1968) (defendant refused to sell house to plaintiff solely because plaintiff was a Negro).

[9] The court's interpretation of Congressional intent that section 1982 prohibited private acts of discrimination has not met with unanimous approval. *See id.* at 449 (Harlan, J., dissenting); Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 S. Ct. Rev. 89; Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 Colum. L. Rev. 1019 (1969).

[10] U.S. Const. amend. XIII states:

> Section 1: Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2: Congress shall have the power to enforce this article by appropriate legislation.

[11] 392 U.S. at 439, *quoting* Civil Rights Cases, 109 U.S. 3, 20 (1883).

[12] Although *Mayer* dealt only with section 1982, the Court did recognize that sections 1981 and 1982 arose out of the same original statute. Also, the discussion in *Mayer* of the legislative debates at the time section 1 was passed included contractual rights protected under section 1981, as well as property rights protected under section 1982. *Id.* at 427. Finally, the Court in *Mayer* directly overruled Hodges v. United States, 203 U.S. 1 (1906), which had held that what is now section 1981 did not pertain to private acts of discrimination. *Id.* at 441, n.78. Some authorities have submitted that if the Court had not wanted to give section 1981 a parallel interpretation with section 1982, the Court would have distinguished *Hodges*. *See* Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 56, 60-61 (1972).

[13] Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968) (based on *Mayer*).

denial of employment.[14] Section 1981 was applied directly to a refusal to make a contract of employment in *Waters v. Wisconsin Steel Works*,[15] where employment discrimination against a Black was held to be a violation of his contractual rights. Section 1981, with its all-encompassing language, can conceivably prohibit every act of private discrimination,[16] but the courts have recognized two possible limitations to this far-reaching effect. The first of these limitations is the repeal by implication[17] of section 1981 by later civil rights legislation.[18] These later civil rights acts are precisely drawn and contain specific exemptions to their coverage.[19] The circuit courts have reached various conclusions as to the effect of these acts on the scope of section 1981.[20] The courts, however, have considered only procedural conflicts. They have not considered the effect of section 1981 on conduct expressly exempt from liability by a later statute.[21] This precise issue was presented to the Supreme Court in *Tillman v. Wheaton-Haven Recreation Association, Inc.*[22] The circuit court had held that the defendant fell within section 2000a(e), an exception to liability under the Civil Rights Act of 1964,[23] and was therefore exempt from liability under section 1981.[24] The Supreme Court reversed, but only because the defendant did not fall within the exception of section 2000a(e). The Court never reached the question of the repeal by implication of section 1981.[25] The second possible limitation on the scope of section 1981 is its possible encroachment on the constitutionally protected rights of freedom of association and the right to privacy.[26] These rights have been recognized as distinct constitutional rights since *N.A.A.C.P. v. Alabama*.[27] Neither, however, is absolute and both may be curtailed if there is a contrary, substantial state interest involved.[28]

---

[14] *Id.* at 420.

[15] 427 F.2d 476 (7th Cir. 1970). "Every indicia of Congressional intent points to the conclusion that section 1981 was designed to prohibit private job discrimination." *Id.* at 483; *accord*, Hacket v. McGuire Bros., Inc., 445 F.2d 442 (3rd Cir. 1971); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971). *But see* Smith v. North American Rockwell Corp.—Tulsa Div., 50 F.R.D. 515 (D.C. Okla. 1970) (holding section 1981 applicable only to state action).

[16] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 449 (1968) (Harlan, J., dissenting); Casper, *supra* note 9; Note, *supra* note 9, at 1029 and n.56; Comment, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 95 (1968).

[17] *See generally* United States v. Borden Co., 308 U.S. 188 (1939) (when two statutes overlap, both statutes should be enforced if possible); Posadas v. National City Bank, 296 U.S. 497 (1936) (when reconciliation is not possible, the latest statute repeals the former); Note, *Civil Rights: Closing the Backdoor to the Discriminating Private Club*, 32 MD. L. REV. 128, 130-35 (1972).

[18] 42 U.S.C. § 2000a (1970) (public accommodation); 42 U.S.C. § 2000e (1970) (equal employment opportunity); 42 U.S.C. § 3601 (1970) (fair housing).

[19] For example, 42 U.S.C. § 2000a(e) provides:

> The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such an establishment are made available to the customers or parties of an establishment within the scope of subsection (b) of this section.

[20] Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971) (failure to perfect suit under section 2000a(e) was not a bar to action under section 1981); *accord*, Brady v. Bristol Myers, 459 F.2d 621 (8th Cir. 1972); Hacket v. McGuire Bros., Inc., 455 F.2d 442 (3rd Cir. 1971). *But see* Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970) (reasonable excuse for not perfecting suit under section 2000e must be shown before action may be brought under section 1981). *See generally* Note, *Is 1981 Modified by Title VII of the Civil Rights Act of 1964?*, 1970 DUKE L.J. 1223.

[21] Note, *Civil Rights: Closing the Backdoor to the Discriminating Private Club*, *supra* note 17, at 134.

[22] 410 U.S. 431 (1973) (Negro landowner brought suit under sections 1981 and 1982 for denial of membership in community recreational facilities opened to those living in the area).

The court in the instant case recognized that admission to a private school involves a contractual relationship between the student and the school. Accepting the holding in *Jones v. Alfred H. Mayer Co.*[29] that private acts of discrimination in the sale of property were prohibited by section 1982, the court stated that the dicta in *Mayer* and the holding in *Tillman v. Wheaton-Haven Recreation Association, Inc.*[30] indicated that section 1981 deserved a parallel interpretation. Since the plaintiffs in the instant case were denied the opportunity to make a contract that would have been made with White persons, plaintiffs' rights under section 1981 were violated. Also, since the only criterion for admission was race, the court held that the defendant schools were not private clubs within the exceptions expressed in Section 2000a(e) of the Civil Rights Act of 1964.[31] By way of dictum, the court went further and stated that section 1981 was not limited by section 2000a(e). The schools would be liable, therefore, for their discriminatory practices under section 1981 even if they had fallen within the exemptions provided in section 2000a(e).

In the instant case the court has threatened the right to existence of all-

---

[23] 42 U.S.C. § 2000a(e) (1970).

[24] 451 F.2d 1211 (4th Cir. 1971).

[25] The court allowed recovery under both sections 1981 and 1982 and held that the two statutes should receive parallel interpretation. In Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), an earlier case that included facts similar to *Tillman*, the Court only allowed relief under section 1982. Some writers interpreted this decision as meaning that the Supreme Court at that time was hesitant about extending section 1981's coverage. Comment, *The Supreme Court, 1969 Term*, 84 Harv. L. Rev. 82, 85 & n.19 (1970).

[26] Moose Lodge v. Irvis, 407 U.S. 180 (1972) (Douglas & Marshall, JJ., dissenting, stated that government may not interfere with solely private clubs and that the right of association allows all-White, all-Black, all-Brown, and all-Yellow clubs to be formed); *cf.* Norwood v. Harrison, 93 S. Ct. 2804 (1973); Cook v. Advertiser Co., 458 F.2d 1119 (1970); Evans v. Newton, 382 U.S. 296, 315 (1966) (Harlan, J., dissenting).

[27] 357 U.S. 449 (1958). *See generally* Annot., 8 A.L.R. Fed. 634 (1971); Comment, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 460 (1970).

[28] N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958). *Compare* Uphaus v. Wyman, 360 U.S. 72 (1959), *with* Williams v. Rhodes, 393 U.S. 23 (1968), *and* Jenness v. Fortson, 403 U.S. 431 (1971).

[29] 392 U.S. 409 (1968).

[30] 410 U.S. 431 (1973).

[31] 42 U.S.C. § 2000a(e) (1970).

White private schools by extending section 1981 to its furthest limits. Although section 1981 does not expressly prohibit such a broad interpretation, prior applications of the statute should be analyzed to determine if such an extension is justifiable. The court in the instant case relied on *Mayer*,[32] *Sullivan v. Little Hunting Park*[33] and *Tillman*[34] in extending section 1981 to discrimination involving private schools. Each of these cases, however, dealt with private acts of discrimination involving strong commercial interests.[35] The commercial aspects were much more central to the issues of the cases than were any social relationships or associational interests. On the other hand, in cases where social relationships have been vital, the courts have not prohibited private acts of discrimination.[36] A recent case which seems to recognize this distinction is *Norwood v. Harrison*.[37] In *Norwood*, the Court, while declaring state aid to discriminatory private schools to be a violation of the 14th amendment, stated, "Such private bias is not barred by the Constitution, nor does it involve any sanction of the laws. . . ."[38] The Court further stated that, "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . ."[39] This language was brought to the present court's attention, but the court discharged it by pointing to other language in *Norwood* which indicated to the court that the case was not intended to be a discussion of the right of private schools to discriminate against Blacks.[40] This statement, however, is followed by a citation to *Pierce v. Society of Sisters*[41] which held that private schools do have a right to exist as long as they conform to certain state standards.[42] Contrary to the instant court's interpretation, the *Norwood* Court impliedly recognized the right of such private schools to exist. Both associational and commercial interests are present in the instant case. The commercial interests are manifested by the schools' advertising in the "yellow pages" and by the schools' charging of tuition. Such weak commercial interests call for the application of section 1981. There are also, however, strong associational interests which are manifested by the schools' all-White character. It is the duty of the courts to balance the associational versus the commercial interest in each case to determine which interest is paramount. *Norwood* seems to indicate that the Supreme Court would give priority to the protection of the right of association. The instant court seems to attack the commercial aspects.

---

[32] 392 U.S. 409 (1968).

[33] 396 U.S. 229 (1969).

[34] 410 U.S. 431 (1973).

[35] *Jones* involved the selling of property in an arms-length business transaction. *Sullivan* and *Tillman* involved membership in a community recreational facility that was incident to the ownership of property in the area.

[36] *See* cases cited note 26 *supra*.

[37] 93 S. Ct. 2804 (1973).

[38] *Id.* at 2812-13.

[39] *Id.* at 2813.

[40] *Id.* at 2806.

[41] 268 U.S. 510 (1924).

[42] Such standards have not as yet been interpreted to include non-racial admissions policies. *Id.* at 534.

If the Supreme Court does decide that discrimination in private schools must be eliminated, the application of section 1981 is not the answer. The statute, as Justice Harlan remarked, is open-ended, and would make a dangerous pitfall for future encroachment on the freedom of association.[43] A more direct prohibition of discrimination by private schools could be accomplished by applying the "private individuals assuming governmental functions" theory.[44] This theory holds that education is a governmental function and it is unlawful for government to avoid its legal responsibility by permitting its duties to be assumed by a private group. By applying this "state action" theory, the Supreme Court could prohibit acts of discrimination by private schools without extending this prohibition to all private acts.[45] The instant case provides an excellent opportunity to delineate the undefined and ever-expanding bounds of section 1981. The countervailing associational and commercial interests are simultaneously present and well defined. By limiting its effect, the court would place section 1981 in perspective as a well-honed tool in the protection of the Black man's rights without creating a snare for future encroachments on other civil rights.

J. Price Coleman

---

[43] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 449-80 (1968) (Harlan, J., dissenting).

[44] Bassett, *The Reemergence of the "State Action" Requirement in Race Relations*, 22 **Cath. L. Rev.** 39 (1972); Dorson, *Racial Discrimination in Private Schools*, 9 **Wm. & Mary L. Rev.** 39 (1967); Note, *Post Brown Private White Schools—An Imperfect Dualism*, 26 **Vand. L. Rev.** 587 (1973); Note, *Segregation Academies and State Action*, 82 **Yale** L.J. 1436, 1456-61 (1973). *But see* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 29-39 (1973).

[45] The "private individuals assuming governmental functions" theory is not without its problems. An extension of this theory to its furthest limits might lead to first amendment establishment of religion problems in private sectarian schools.

CONTRACTS—DEALER FRANCHISES—TERMINATION OF FRANCHISE WITHOUT GOOD CAUSE IS VOID AS AGAINST PUBLIC POLICY

Appellant, a major oil company, brought an action[1] in county district court[2] to dispossess the premises of a retail gasoline station from appellee station operator for wrongfully holding over after notification that his lease and franchise[3] contract[4] would not be renewed. Appellee contended that termination without "good cause" was barred by the New Jersey Franchise Practices Act.[5] The trial court[6] granted appellee the equitable remedy of reformation by implying a covenant that the franchisor could not terminate the agreement except for good cause. The court further found that appellant had not terminated the franchise for good cause and that appellee had substantially performed his contract obligations.[7] On appeal to the New Jersey Supreme Court, *held*, modified, and affirmed as modified.[8] A franchisor's unilateral contract right not to renew a lease and dealer agreement without showing that the franchisee failed to substantially perform his contract obligations is void as against public policy requiring "good cause" to terminate a franchise.[9] *Shell Oil Co. v. Marinello*, 63 N.J. 402, 307 A.2d 598 (1973).

---

[1] Although appellant's termination of appellee's franchise without good cause on 10 days' notice is the basic issue, appellee initiated the litigation after being notified that his lease and franchise would not be renewed. Refusing to vacate the premises, appellee immediately filed suit in superior court for injunctive relief and asked that the dealer agreement be reformed so as to show a joint venture. Appellant then filed a summary dispossess complaint in the county district court for possession of the service station premises, alleging that appellee was wrongfully holding over. Appellant's action was assigned to superior court where the two actions were consolidated.

[2] Shell Oil Co. brought suit pursuant to N.J. STAT. ANN. § 2A:18-53 (1952).

[3] Gellhorn, *Limitations on Contract Termination Rights-Franchise Cancellations*, 1967 DUKE L.J. 465-66, 466 n.1 *quoting* E. LEWIS & R. HANCOCK, THE FRANCHISE SYSTEM OF DISTRIBUTION 1 (1963), provides the following explanation of the franchise relationship:

> [I]n its simplest form, franchising involves a company with a product or service which arranges for a group of dealers to handle its distribution. The company with the product, product line, or service is known as the franchisor, and the dealers who acquire the right to sell the product or service exclusively are known as the franchisees.

[4] Appellee had executed standard lease and dealer agreement contracts after appellant's representative offered him a dealership at an existing service station in Fort Lee, New Jersey. This relationship was continued by yearly contract renewals until a 3-year lease and dealer agreement was executed in April 1969. The lease agreement was renewable annually after an initial term ending May 31, 1972, but subject to termination by appellee on 90 days' notice given at any time, and by appellant at the end of the primary term, or at any time thereafter on 30 days' notice. The dealer agreement was written to coincide with the lease, but was subject to termination at any time by giving at least 10 days' notice. On April 14, 1972, appellant franchisor gave appellee written notice that his lease and dealer agreement would not be renewed, effective May 31, 1972. After appellee's June 1 refusal to surrender the premises, appellant filed its dispossess action.

[5] N.J. STAT. ANN. § 56:10-5 (Supp. 1972-73) provides in part:

> It shall be a violation of this act for a franchisor . . . to terminate, cancel or fail to renew a franchise . . . without good cause. For the purposes of this act, good cause for terminating, cancelling, or failing to renew a franchise shall be limited to failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise.

[6] Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 294 A.2d 253 (1972).

[7] Appeal on the consolidated actions was pending unheard in the appellate division when Direct Certification was ordered to the Supreme Court of New Jersey.

The problems created by arbitrary termination of a franchise by a franchisor have never been successfully handled jurisprudentially.[10] Franchise agreements are subject to the general law of contracts, except where restrained by principles of equity or preempted by statute. Courts in most jurisdictions hold that a franchise agreement clause expressly providing for termination without cause on notice is enforceable when the condition of notice is met, in accordance with the common law "freedom to contract" principle.[11] Where no provision for notice is provided, some courts have been willing to limit the harshness of sudden termination on the franchisee by requiring reasonable notice of termination.[12] This policy has had no effect on harsh terminations pursuant to short-notice provisions,[13] nor has it weakened the franchisor's coercive lever of threatened termination.[14] Termination clauses have been held invalid under the law of contracts where there is fraud, duress, or lack of mutuality of obligation or consideration[15] while discriminatory cancellation has also been proscribed by waiver and estoppel.[16] Some courts have applied the doctrine of unconscionability to contract terms, but have been reluctant to apply it to a contract which was reasonable when made but produced harsh results upon termination.[17] These common law remedies have failed to produce a uniform law insulating the franchisee from termination without cause pursuant to an express contract provision.[18] In looking elsewhere for ways to reach a fair result, courts have applied "good faith" principles which limit the legal right to terminate when wrongful motives are found. Though seldom successfully raised in franchise termination cases,[19] the question of whether a terminating party acted in "good faith" was recognized in dicta of two 1931 decisions, *J.R. Watkins Co. v. Rich*[20] and *Philadelphia Storage Battery Co. v. Mutual Tire Stores*,[21] although neither case has been widely accepted.[22]

---

[8] Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598, 600 (1973), where the court found specific reformation of the lease and dealer agreements unnecessary since the same result was reached by considering the instruments, the parties' relationship, and the public policy of New Jersey.

[9] *Cf.* Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970) (upholding tenant's right to offset repairs to rent because public policy compelled an implied covenant requiring the landlord to make repairs); *In re* Arens, 41 N.J. 364, 197 A.2d 1 (1964) (applying a statutory expression of public policy to a trust created prior to the non-retroactive statute's enactment); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (holding that a warranty of merchantability, implied as a matter of public policy, was not defeated by a contract provision excluding implied warranties).

[10] *See* Gellhorn, *supra* note 3, at 472.

[11] *E.g.*, Tamm v. Ford Motor Co., 80 F.2d 723, 730 (8th Cir. 1935); Motor Car Supply Co. v. General Household Util. Co., 80 F.2d 167, 171 (4th Cir. 1935); Ford Motor Co. v. Kirkmyer Motor Co., 65 F.2d 1001, 1006 (4th Cir. 1933).

[12] *E.g.*, Glover v. Henderson, 120 Mo. 367, 25 S.W. 175, 177 (1894) (the earliest case applying the "Missouri" doctrine of agency law to contracts). The "Missouri" doctrine is explained in F. MECHEM, A TREATISE ON THE LAW OF AGENCY § 620 (1889). As applied to contracts, the doctrine bans termination until the dealer has had an opportunity to recoup initial expenditures.

[13] *E.g.*, Sharpe v. Great Lakes Steel Corp., 9 F.R.D. 691 (S.D.N.Y. 1950).

[14] *E.g.*, Myers Motor, Inc. v. Kaiser-Frazer Sales Corp., 178 F.2d 291, 301 (8th Cir. 1949), where a dealer's contract specifically excluded liability of the manufacturer in the event of termination for the dealer's expenses incurred while performing contract obligations. *See generally* S. WILLISTON, CONTRACTS § 1017A (3d ed. 1967).

[15] *See generally* Campbell Soup Co. v. Wentz, 172 F.2d 80, 83-84 (3d Cir. 1948); J.R. Watkins Co. v. Rich, 254 Mich. 82, 235 N.W. 845 (1931); Globe Woolen Co. v. Utica Gas & Elec. Co., 224 N.Y. 483, 121 N.E. 378 (1918).

[16] *See* Ford v. Culbertson, 158 Tex. 124, 138-39, 308 S.W.2d 855, 865 (1958), for an

---

explanation of when waiver and estoppel may be used to protect a terminated party against discriminatory cancellation.

[17] *See* Victory Motors of Savannah, Inc. v. Chrysler Motors Corp., 357 F.2d 429 (5th Cir. 1966); Milos v. Ford Motor Co., 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963). *But cf.* Madsen v. Chrysler Corp., 261 F. Supp. 488, 506 (N.D. Ill. 1966).

[18] *See* Gellhorn, *supra* note 3, at 472, 495.

[19] *Id.* at 499.

[20] 254 Mich. 82, 235 N.W. 845 (1931). This case involved a sales agency contract which was terminated only 1 month after the agreement's inception. The testimony strongly indicated that plaintiff's only purpose in executing the contract was to obtain a surety guarantee and then collect on it immediately. The Supreme Court of Michigan determined that since there was no intention of performing the contract, the surety's signature had been fraudulently induced. The court went further to imply a constructive condition of good faith on the right to terminate. Previous Michigan cases had held that sales agency contracts with indefinite terms were terminable at will without proof of good faith. *See* Garlock v. Motz Tire & Rubber Co., 192 Mich. 665, 159 N.W. 344 (1916); Fuchs v. Standard Thermometer Co., 178 Mich. 37, 144 N.W. 484 (1913); *accord*, Bushwick-Decatur Motors, Inc. v. Ford Motor Co., 116 F.2d 675, 677 (2d Cir. 1940); Martin v. Ford Motor Co., 93 F. Supp. 920, 921 (E.D. Mich. 1950).

[21] 161 S.C. 487, 159 S.E. 825 (1931). The facts here indicated that the manufacturer used the termination provision of a "jobber" agreement to financially ruin a dealer after loading him down with inventory and repair equipment which he could not return. The court stated that an agreement "may not be terminated, if the manner of its termination be against equity and good conscience." *Id.* at 826. Despite emphasis on the franchisor's wrongful motives in terminating, both *Rich* and *Philadelphia Storage Battery* involved facts from which the courts could have found fraud.

[22] *See* Bushwick-Decatur Motors, Inc. v. Ford Motor Co., 30 F. Supp. 917 (E.D.N.Y. 1940), *aff'd*, 116 F.2d 675 (2d Cir. 1940), where the issue of good faith was clearly alleged, but the Second Circuit Court of Appeals, applying Michigan law, *held*, the franchise agreement was not subject to a good faith limitation. In rejecting *Rich*, the court contended that good faith should not govern terminations as a matter of public policy.

> Such a limitation can be read into the agreement only as an overriding requirement of public policy. This seems an extreme step for judges to take . . . . [T]he dealers are not misled or imposed upon, but accept as nonetheless advantageous an agreement in form bilateral, in fact one-sided. To attempt to redress this balance by judicial action without legislative authority appears to us a doubtful policy. We have not proper facilities to weigh economic factors, nor have we before us a showing of the supposed needs which may lead the manufacturers to require these seemingly harsh bargains.

In other cases not involving franchises, courts finding a contract in violation of public policy or tending to injure the public interest have been willing to alter or void the offending provisions.[23] Because of the difficulty of defining "public policy,"[24] courts have been reluctant to recognize it in sources other than the Constitution, statutes, and judicial decisions.[25] These sources do not have to be directly applicable to determine the outcome of a case where they are found to be an expression of public policy.[26] The failure to find a uniform judicial solution to the problem of harsh terminations has stimulated legislation designed to protect the franchisee.[27] The present New Jersey Franchise Practices Act prohibits a franchisor from terminating, cancelling, or failing to renew a franchise without "good cause."[28] When enacting the Franchise Practices Act, the New

---

Id. at 677.

[23] *See* Bell v. McAnulty, 349 Pa. 384, 37 A.2d 543, 544 (1944), where the court states that "where the legislature has, by definite and unequivocal language, determined the public policy of this Commonwealth with regard to a particular subject, that pronouncement cannot be set aside and rendered unenforceable by a contract between individuals." A similar approach was taken in Driscoll v. Burlington-Bristol Bridge Co., 10 N.J. Super. 545, 77 A.2d 255, 270 (1950), holding *inter alia* that no contract on any subject matter can be sustained ". . . which the law upon reasonable grounds, forbids as inconsistent with the public interest, or as hurtful to the public order, or as detrimental to the common good."

[24] *E.g.*, Jones v. American Home Funding Ass'n, 191 Iowa 211, 182 N.W. 191, 192 (1921).

[25] *See* 17 C.J.S. *Contracts* § 211(b) (1963).

[26] *E.g.*, *In re* Arens, 41 N.J. 364, 197 A.2d 1 (1964).

[27] Section 2 of the Automobile Dealer Franchise Act, 15 U.S.C. §§ 1221-25 (1956), allows the wrongfully terminated franchisee to sue in Federal court for damages. The Puerto Rican Legislature in 1964 enacted the Dealer's Contract Law, P.R. **Laws Ann.** tit. 10, §§ 278-78d (Supp. 1968), which applies to all types of franchise agreements. The First Circuit held the law unconstitutional as applied to a preexisting dealership that was terminable at will. Fornaris v. Ridge Tool Co., 423 F.2d 563 (1st Cir.), *rev'd per curiam*, 400 U.S. 41 (1970). Pertinent to termination rights, § 278(a) of the law provides:

> Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may directly or indirectly perform any act detrimental to the established relationship or refuse to renew said contract on its normal expiration except for just cause.

The first state statute dealing with general franchise terminations was **Del. Code Ann.** tit. 6, §§ 2551 *et seq.* (Cum. Supp. 1970), which was found to be in violation of Article 1, Section 10 of the United States Constitution. Globe Liquor Co. v. Four Roses Distillers Co., 281 A.2d 19, *cert. denied*, 404 U.S. 873 (1971).

[28] N.J. **Stat. Ann.** §§ 65:10-1 *et seq.* (Supp. 1972-73). The principal difficulty with state acts regulating termination of existing franchise contracts has been violation of the contract clause of the United States Constitution. *See* U.S. **Const.** art. 1, § 10, providing that "[N]o State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." *See, e.g.*, Globe Liquor Co. v. Four Roses Distillers Co., 281 A.2d 19, 21 (1971), where the court found that the Delaware Franchise Security Law, **Del. Code Ann.** tit. 6, §§ 2551-57 (Supp. 1971), unconstitutionally altered contract obligations by prohibiting refusal to renew a franchise, and thereby creating a contract of indeterminate duration.

Jersey Legislature purposely provided against retroactive application[29] to avoid conflict with the contract clause of the United States Constitution.[30]

The court in the instant case observed that provisions allowing the franchisor to terminate the lease and dealer agreement with notice were unilateral, since, by terminating, the franchisee would lose business and trade he had built up. The court found that unilateral contract provisions which result from grossly disproportionate bargaining power are void where the public is injured in some way. Citing the State Unfair Motor Fuels Practices Act[31] and alluding to the economic realities of a motor vehicle age, the court found that the public interest was injured by termination of the franchise agreement. The court recognized that the New Jersey Act, though not controlling, expresses the public interest in distribution and sales through franchise arrangements, and that the Act prohibits a franchisor from terminating without good cause, which it defined as failure of the franchisee to substantially perform franchise obligations. Citing *In re Arens*[32] as authority, the court held that the New Jersey Act reflected the existing state public policy. Considering the record, the court found ample support for the trial court's finding that since the franchisee had substantially performed his contract obligation, the termination was without good cause.

The instant case provides the first rule (in the absence of fraud) for voiding as unilateral and contrary to public policy a franchise clause allowing either party to terminate without good cause. The Legislature of New Jersey considers franchise contracts to be highly suspect because of the history of franchisor abuses of the "freedom to contract" principle. The impressive financial success[33] of franchisors has been due in part to the execution, without bargaining, of one-sided standardized contracts, which favor the franchisor.[34] The common law "freedom to contract" principle assumed that parties free to set the rules governing their agreement would be of equal bargaining strength. Unjust results could be avoided by knowing the terms of the proposed agreement and carefully choosing between competing offers.[35] The typical franchise arrangement pits an economic giant in the role of franchisor against an economically weak franchisee.[36] In this situation, as the court observed in *Marinello*, there is no freedom to contract.[37] "Freedom to contract" not only failed to protect the franchisee and public interests, it also paradoxically failed to produce free bargaining.[38] By abandoning the "freedom to contract" approach in order to imply a "good cause" termination covenant, the court achieved an equitable result by balancing the bargaining power in the franchise relation. The court's decision to limit the grounds for franchise termination by the franchisor to good cause alters the relation between the parties to the franchise in question, giving it an indefinite existence,[39] conditioned on the franchisee's substantial performance of his contract obligations. Thus, important legal consequences flow from the judicial determination that an agreement is a franchise rather than another type of contract. *Marinello* provides a pattern for the immediate implementation of non-retroactive franchise legislation as a constitutionally sound alternative to the retroactive state statutes which ran afoul of the contract clause of the United States Constitution. The present case could also be authority for implying good cause termination covenants on the basis of public policy expressions of the Uniform Commercial Code[40] or other statutes[41] not directly giving rise to a cause of action. Even without statutory guidance, a court could follow *Marinello* and imply in all franchises, as a matter of law, a covenant of good cause termination.[42] The scope of the instant case is not limited to any particular type of franchise,[43] because the holding is broadly based on the Franchise Practices Act, which declares the termination of franchises in general to be affected by a public interest.[44] The court's rejection of "freedom to contract," where disparity of bargaining power results in contract provisions which are contrary to the public interest, is equally applicable to non-franchise type contracts. Observance of the characteristics and legal consequences of a franchise is important not only to parties intending to enter the franchise relation,[45] but also to parties intending to avoid a franchise by drafting a different relation, such as a sales and distribution agency contract.[46]

---

[29] N.J. STAT. ANN. § 56:10-8 (Supp. 1972-73) provides:

> This act shall not apply to a franchise granted prior to the effective date of this act, provided, however, that a renewal of a franchise . . . shall not be excluded from the application of this act.

[30] *See* Comment, *Franchise Regulation: An Appraisal of Recent State Legislation*, 13 B.C. IND. & COM. L. REV. 529, 560-61 (1972), wherein the author thoroughly discusses the history of state franchise legislation. *See also* H. BROWN, *The Realities of Franchising*, THE FRANCHISING SOURCEBOOK § 12.2, at 190-246 (J. McCord ed. 1970).

[31] N.J. STAT. ANN. § 56:6-19(c) (1964).

[32] 41 N.J. 364, 197 A.2d 1 (1964).

[33] In the past decade the number of franchised outlets doubled from 300,000 to approximately 600,000 units. Current annual sales through franchise units are roughly $90 billion, or 10 percent of the nation's Gross National Product. *Hearings on the Impact of Franchising on Small Business, Before the Subcomm. on Urban and Rural Economic Development of the Senate Select Comm. on Small Business*, 91st Cong., 2d Sess. pt. 1, at 1 (1970).

[34] *E.g.*, Seegmiller v. Western Men, Inc., 20 Utah 2d 352, 437 P.2d 892, 894 (1968), where the court observed:

> [Franchise contracts] are almost always drawn up by the franchiser and are presented to a dealer . . . for acceptance . . . rather than for negotiation as to terms. They also invariably provide for ample protection to the rights of the franchiser, including the right of termination.

---

[35] *See* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

[36] *Id.*

[37] *See* Shell Oil Co. v. FTC, 360 F.2d 470, 487 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967), where the court examined the market structure of the petroleum industry:

> The relationship of a major oil company to its service station dealer goes beyond the bigness-littleness antithesis that exists in innumerable contract negotiations and in the operations of a modern, large business. The inherent leverage a major oil company has over its dealers results from the market structure of the industry and the special dependence on the company of the service station dealer. . . . While it is true that it is expensive for Shell to switch dealers, it is far more expensive, in relative terms, for a dealer to lose his station.

[38] *See* Kessler, *supra* note 35, at 632.

[39] *See* 63 N.J. 402, 307 A.2d at 603, where the court leaves open the question of whether the franchise's existence would survive the death or disability of the franchisee.

[40] It has been suggested that the Uniform Commercial Code might relieve franchise abuse through its requirements of good faith and conscionability in requirements contracts. Brown, *Franchising—A Fiduciary Relationship*, 49 TEXAS L. REV. 650 (1971). *E.g.*, UNIFORM COMMERCIAL CODE §§ 2-302,-306(1) (Official Text 1962). *See* Hewitt, *Termination of Dealer Franchises and the Code—Mixing Classified and Coordinated Uncertainty With Conflict*, 22 BUS. LAW. 1075 (1967).

[41] Treatment of the franchise as a security under the 1933 Securities Act, the 1934 Exchange Act, Section 8-102 of the Uniform Commercial Code, or state blue sky laws are possibilities.

The basic business advantages of the franchise system survive under *Marinello*.[47] The reaction of franchisors to the loss of franchise control[48] through the termination clause is likely to be minor since companies generally do not rely on a policy of termination without cause.[49] Yielding such control could even prove beneficial to the franchisor in the recruitment of franchisees attracted by franchise security.[50] The change in franchise law made by the court in the present case relieves the franchisee from the intimidation of threatened termination. In doing so, it brings order to the hodge-podge of equitable remedy approaches to franchise termination taken by courts in the past. The New Jersey Franchise Practices Act and its construction in *Marinello* may serve as prototypes for legislation and adjudication elsewhere, justifying anticipation of its legal consequences in other jurisdictions.

---

[42] *See* American Bank & Trust Co. v. Federal Reserve Bank, 256 U.S. 350 (1921), where Justice Holmes theorized that contract rights cannot be exercised in an unreasonable or oppressive manner. Applied to the franchise, a franchisor with a legal right to terminate could not exercise that right "contrary to equity or good conscience."

[43] N.J. STAT. ANN. § 56:10-4 (Supp. 1972-73). The type of franchise falling under the Act is limited to those in which gross sales between the franchisor and franchisee have exceeded $35,000 for the 12-month period preceeding the filing of the suit, and where more than 20 percent of the franchisee's gross sales are intended to be or are derived from the franchise. Arguably, since the statute is severable, the public policy provisions would apply to suits not pursuant to the Act.

[44] N.J. STAT. ANN. § 56:10-2 (Supp. 1972-73).

[45] The wording of section 3 of the Franchise Practices Act, N.J. STAT. ANN. 56:10-1 (Supp. 1972-73), defining a franchise as any "written arrangement for a definite or indefinite period . . ." implies the possibility of having a franchise conform to the "good faith" limitation on termination by the franchisor, yet exist for some definite period of time. A drafting problem is presented in defining the term of the franchise with sufficient definiteness to expire without cancellation or failing to renew, yet protect the vested interests of the parties and provide enough flexibility to allow the parties to renegotiate for an additional term, without obligation. Since in the usual franchise renewal a standardized renewal contract is merely accepted by the franchisee, actual negotiation being impractical where hundreds or thousands of franchise units are involved, it may be impossible to provide an alternative requiring negotiation that would be feasible administratively, and still be judicially distinguishable from a franchise renewal.

[46] The distinction in this example is between a license to sell, which is a franchise, and an agent employed to sell for the supplier, which is a sales and distribution agency.

[47] Franchising is most often adopted by companies desiring increased sales income, but lacking requisite capital and sales outlets for large-scale growth and expansion. The company can obtain capital by charging initial franchise fees, and can increase sales through additional franchised sales outlets. *See* E. LEWIS & R. HANCOCK, THE FRANCHISE SYSTEM OF DISTRIBUTION (1963), reprinted in *Hearings on S. Res. 40 Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 1, 300 (1965). There are also advantages in advertising, management guidance, and buying. In overly competitive industries—such as oil, in which there is proliferation of service stations far in excess of the reasonable demand—the profit motivation of the franchisee as an independent businessman produces great exertions to build up the business, and in turn, increased profits for the franchisor. Minimum wage and hour legislation, and the threat of unionization are other factors that might offset the loss of franchise control from the *Marinello* rule.

William Riddick Armstrong, Jr.

---

[48] One author suggests that it is of value to the franchisor to eliminate problems of control, antitrust accusation (and treble damages), discrimination, and dual distribution (to both franchisee and a competing independent or company outlet). He advises the franchisor to retain only the right to terminate for "good cause," and give the franchisee the right to renew. The franchisor would be protected by the terms, which would be the same as those given to other franchisees at that time. B. **Goodwin**, *Financing for the Franchisee*, **The Franchising Phenomenon** 195 (1969). Another author believes that loss of controls would be detrimental to both franchisor and franchisee, to the extent of causing the collapse of the system and conversion to a fully integrated chain. J. **Fels**, *The Franchsing Phenomenon: An Overview*, **The Franchising Phenomenon** 30-31 (1969). Conversion to company ownership of retail outlets is an expensive proposition, for franchisors would have to compensate existing franchisees for loss of the franchise. *See* Shell v. Marinello, 63 N.J. 402, 307 A.2d 598, 603 (1973). Its attractiveness will fluctuate with the relative importance of franchise distribution advantages and controls that will vary from company to company.

[49] *See, e.g.*, Shell v. Marinello, 120 N.J. Super. 357, 294 A.2d 253, 262 (1972), where Shell Oil's own witnesses testified that Shell never cancelled a lease without justification, and that Shell's policy was not to terminate a lessee-dealer except for good cause.

[50] The elimination of abuses should enhance the attractiveness of the franchise to the individual investing heavily from limited personal resources, and to the lending institution reluctant to invest in high-risk retail outlets. For example, the annual insolvency rate among gasoline service stations ranges from 25 to 40 percent. Brown, *supra* note 40, at 656.

Corporations—Securities Regulation—Outsider Tippees Are Liable to Corporate Shareholders for Participating in Breach of Fiduciary Duty

Corporate shareholders were joined in a derivative action[1] under diversity jurisdiction[2] against a corporate officer and six outsiders[3] who were alleged to be jointly and severally liable under state law[4] for profits garnered while trading in derivative defendant corporation's[5] stock, after receiving confidential corporate information. Upon learning that a prior public forecast of earnings was too optimistic, the corporation's president disclosed the latest earnings prospects to an employee of a stockbrokerage firm. The broker's employee then relayed the tip to the manager of a mutual fund who subsequently revealed it to the manager of another fund. Acting on the advice of these managers, the mutual funds sold their substantial holdings in the corporation before a public announcement of the diminished earnings.[6] Plaintiffs contended that under New York law the defendants were jointly and severally liable to derivative defendant corporation for the illegal profits. Defendants moved for dismissal alleging that Florida law controlled and that no cause of action had been stated under existing Florida law. The United States District Court for the Southern District of New York adopted the defendants' position and entered a summary judgment. On appeal to the United States Court of Appeals for the Second Circuit, *held*, reversed and remanded. When outsider tippees become traders advantageously possessed of confidential insider information through a breach of fiduciary duty, a cause of action arises to those to whom the fiduciary duty is owed against all persons participating in the chain of disclosure. Schein v. Chasen, 478 F.2d 817 (2d Cir. 1973), *cert. granted sub nom.* Simon v. Schein, 42 U.S.L.W. 3230 (U.S. Oct. 16,

---

> [1] The shareholders' derivative action involves the assertion by a shareholder of a corporate cause of action against persons, either within or without the corporation, who have allegedly wronged it, where the corporation has failed to enforce such claim directly.

H. Henn, Handbook of the Law of Corporations and Other Business Enterprises § 360 (2d ed. 1970) [hereinafter cited as Henn]; Continental Securities Co. v. Belmont, 206 N.Y. 7, 99 N.E. 138 (1912).

[2] 28 U.S.C. § 1332 (1970).

[3] Defendants included the corporation president, a stockbrokerage firm, the broker's employee, two mutual fund managers, and two mutual funds.

[4] At the trial, plaintiffs averred that New York law controlled; defendants argued for application of Florida law. On appeal, all parties agreed that Florida's substantive law should govern. The basis of reconciliation is reported at 335 F. Supp. 329 (S.D.N.Y. 1971). See case cited note 15 *infra*.

> [5] Since the derivative action asserts a corporate cause of action, the corporation is in reality the real party plaintiff. It enters the litigation as a nominal party defendant because of its failure to enforce the claim in its own right.

Henn, *supra* note 1, at § 369.

[6] Defendant mutual funds sold 43,000 and 40,000 shares respectively on the New York Stock Exchange at $17.50 per share. Three hours later on the same Friday, the Exchange halted trading in that stock pending a public corporate announcement of lower earnings. When trading resumed the following Monday, the stock closed at $14, $3.50 per share less than the mutual funds realized by utilizing the tip.

1973) (No. 73-440).

The state and Federal notions of the scope of the duty owed to investors by insiders and their associates have developed along divergent lines. Initially saddled with complete responsibility and authority for the incorporation and regulation of business,[7] the states have served as provincial proving grounds for varying degrees of regulation of corporate fiduciaries. After an early period of incorporation by legislative fiat,[8] a system which fostered graft and monopoly, the states adopted general corporate laws which severely restricted corporate size and activity.[9] Then, sensing the inherent mobility of corporations operating in a federal nation, New Jersey and Delaware emerged as centers of corporate power by largely abrogating their legislative restrictions and realigning corporate authority along managerial rather than investor lines.[10] As corporations gravitated to these less restrictive states, a plethora of railroad and mining stock frauds ensued.[11] State efforts to reassert their authority through the blue sky laws[12] proved inadequate because the character of corporate activities had shifted from intrastate to interstate. National sales of securities had become commonplace and the large stock exchanges had emerged as focal points for securities transactions. The 1929 crash demonstrated finally the need for corporate supervision on a level beyond the capabilities of any state. In the 1930's Federal securities legislation[13] was superimposed upon state law to control interstate corporate activity and to curb fiduciary excesses; purely intrastate corporate regulation, however, remained the province of the states.[14] Congress stated that it had no design to preempt the field of securities legislation,[15] yet the Federal law has become the standard by which all corporate fiduciary law is gauged. In an effort to balance the need to define and enforce the fiduciary duties owed to the corporation against the need to attract and insulate responsible management from disconcerting legal stress, the state courts from the beginning of corporate litigation pursued a rigid adherence to traditional corporate concepts of fiduciary duty.[16] State innovation in interpreting the reach of fiduciary duty tended more to crystallize existing relationships, as between the corporation and insiders, than to create new ones by expansion. A significant departure from this attitude has been the recognition that insiders' duties flow ultimately to the shareholders themselves,[17] a marked refinement of the notion of the body corporate as *principal*. A more moderate school of thought has predicated recognition of this vicarious relationship upon the contingency of "special circumstances,"[18] clinging in their absence to the traditional view. But there has been no parallel liberalizing trend in extending the *agent* concepts beyond those termed corporate insiders, as in the federal law. The Federal approach varies both philosophically and in effect. Unimpeded by a conciliatory hesitance and motivated to maintain free and honest markets, the Federal restraints on fiduciary misdeeds found in section 10b[19] and rule 10b-5[20] account for a substantial amount of the Federal securities litigation. The language of rule 10b-5[21] presages the broad construction given corporate fiduciary duties by the

---

[7] ARTICLES OF CONFEDERATION art. II (1781) provided for no federal incorporation power;

> *(e)ach state retains* its sovereignty, freedom and independence, and *every Power*, Jurisdiction and right, *which is not by this confederation expressly delegated to the United States, in Congress assembled* (emphasis added).

James Madison proposed that Federal incorporation powers be included in the Constitution but the suggestion was defeated. H.R. Doc. No. 398, 69th Cong., 1st Sess. 563 (1927); *see* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[8] Absent any express Federal incorporation authority, the states were free to assume by default the prerogative of incorporation by special acts. The whole concept of incorporation by concession is a throwback to the medieval corporate experience when kings chartered such businesses as overseas trading companies. HENN, *supra* note 1, at §§ 9-12.

[9] Louis K. Liggett Co. v. Lee, 288 U.S. 517, 541 (1933) (dissenting opinion) (Mr. Justice Brandeis on the history of the general acts and multitudinous restrictions).

[10] H. BALLANTINE, BALLANTINE ON CORPORATIONS 39-41 (rev. ed. 1946).

[11] W. KNEPPER, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 7.01 (2d ed. 1973).

[12] Kansas is credited with passage of the first of these general securities or blue sky laws. Kan. L. 1911, c. 133. Today all states have blue sky laws except Delaware, which had a simple anti-fraud law until 1953 at which time it was deleted from the Delaware Code of 1953. HENN, *supra* note 1, at § 305.

[13] Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1933); Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1934).

[14] The Acts of 1933 and 1934 were passed pursuant to the Congressional power to regulate interstate commerce; therefore they have no application to purely intrastate activity.

---

[15] "The rights and remedies provided by this title . . . shall be in addition to any and all other rights and remedies that may exist at law or in equity." 15 U.S.C. § 78bb (1934). *Compare* Hausman v. Buckley, 299 F.2d 696 (2d Cir. 1962), *cert. denied*, 369 U.S. 885 (1962), "[t]he nature and extent of the fiduciary relationship is usually determined by the law of the place of incorporation."

[16] *See, e.g.*, Goodwin v. Agassiz, 283 Mass. 358, 186 N.E. 659 (1933) (insider's nondisclosure not a fraud upon stockholders who trade *impersonally* through brokers); Connolly v.Shannon, 105 N.J. Eq. 155, 147 A. 234 (Ch. 1929) (director not a trustee as to stockholders *individually*); Carpenter v. Danforth, 52 Barb. 581 (N.Y. 1868) (insider's nondisclosure, *absent affirmative misrepresentation*, not actionable as fraud) (emphasis added).

[17] Oliver v. Oliver, 118 Ga. 362, 45 S.E. 232 (1903) (director holds an undivided interest in the corporation in trust for the shareholder).

[18] Strong v. Repide, 213 U.S. 419 (1909) (if only insider has access to "special facts" affecting share value, a fiduciary duty arises to the shareholders).

[19] 15 U.S.C. § 78j(b) (1934).

[20] 17 C.F.R. § 240.10b-5 (1973).

[21] *Id.*

> It shall be unlawful for *any person*, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or by the mails or of any facility of any national securities exchange,
>
> (a) to employ *any device, scheme, or artifice to defraud*,
>
> (b) to make *any untrue statement of a material fact or to omit to state a material fact* necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) to engage in *any act, practice, or course of business which operates as a fraud or deceit* upon *any person*, in connection with the purchase or sale of *any security* (emphasis added).

SEC and Federal courts, extending coverage to a wide variety of persons and institutions[22] both inside and outside the corporate structure. The inclusion of outsiders[23] and tippees[24] is a manifestation of the continuing attempt to equalize the bargaining stances of all who enter the market to deal. The Federal attitude has also colored the outcome of some state litigation[25] and the resulting decisions fill, on a local basis, some of the remedial gaps in the application of the Federal antifraud laws.

In the instant case, the circuit court, finding that the Florida court had never before confronted these facts and thus had no clearly enunciated rule, turned for guidance to the law of another jurisdiction, New York. Discounting the complaints' omissions of allegations of a prior agreement to misuse corporate information, the court reasoned that the chain of events, if proven, was adequate to establish that joint enterprise. Noting the traditional recourse to state law for breaches of fiduciary duty, the court relied upon the decision in *Diamond v.*

---

[22] *See, e.g., insiders*: Speed v. Transamerica Corp., 71 F. Supp. 457 (D. Del. 1947) (*controlling shareholders* oppressing minority shareholders); Kardon v. National Gypsum Co., 73 F. Supp. 798 (E.D. Pa. 1947) (*officers and directors* failing to disclose material information). *See, e.g., outsiders*: SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969) (*anyone in possession of material inside information* is deemed an insider); *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961) (*broker-dealer* utilizing confidential corporate information to protect clients' accounts from imminent loss); *In re* Ward La France Truck Co., 13 S.E.C. 373 (1943) (*business acquaintances* withholding identity of purchaser in manipulation scheme).

[23] *See* the *outsider* cases cited note 22 *supra*.

[24] *In re* Investors Management Co., CCH **Fed. Sec. L. Rep.** ¶ 77,832 (1970), is a federal landmark in the area of tippee liability. Confidential disclosures to a broker-dealer's vice-president were utilized by broker-dealer's employees to make sales and short sales. The SEC rejected the idea that no fiduciary violation could be found without a showing of fiduciary relationship between the corporate officer and the tippee trader or that the tippee knew the disclosure had resulted from a breach of fiduciary duty.

> We consider that one who obtains possession of material, non-public corporate information, which he has reason to know emanates from a corporate source, and which by itself places him in a position superior to other investors, thereby acquires a relationship with respect to that information within the purview and restraints of the antifraud provisions . . . . When a recipient of such corporate information, knowing or having reason to know that the corporate information is non-public, nevertheless uses it to effect a transaction in the corporation's securities for his own benefit, we think his conduct cannot be viewed as free of culpability under any sound interpretation or application of the antifraud provisions.

Id. Note however that Investors Management Co. was *merely censured*; see case cited note 25 *infra*.

[25] Diamond v. Oreamuno, 29 App. Div. 2d 285, 287 N.Y.S.2d 300 (1st Dep't. 1968), *aff'd*, 24 N.Y. 2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969) (derivative *recovery* of insider's earnings garnered before disclosure of pending decrease in corporate earnings—illegal profit *recoupment as a deterrant* to insider trading) (emphasis added). *See also* 83 **Harv. L. Rev.** 1421 (1970).

Oreamuno[26] and rejected appellees' suggestion that regardless of their involvement in the disclosure and exploitation of the tip, they owed no duty to the corporation. Recognizing the important corporate interest which *Diamond* protected, the court determined that a narrow interpretation would violate the spirit of the law and that nothing in *Diamond* suggested that liability should not extend to all participants in the illegal venture. The court relied upon the Florida law as to fiduciaries[27] and the Restatement (Second) of Agency[28] for supportive analogy and concluded that the appellees were bound as fiduciaries by reason of their acquisition of the confidential information.[29] The court further observed in dictum that a contrary holding might operate in instances where a Federal action under 10b-5 was impractical to create a class of immunized outsiders liable to no one for their misdeeds, a possibility to be avoided by strengthening the laws against insider trading.

Judge Kaufman, in dissent, attacked the majority opinion for its faulty reasoning and incorrect bending of the laws of agency and fiduciary duty as a means to discourage insider trading. Advocating the strictest sort of adherence to the corporate fiduciary concepts, Judge Kaufman took issue with the overly broad interpretation of *Diamond* and found that the Florida authorities used for analogy were inapplicable if *Diamond* were construed properly. As to the reliance upon the Restatement (Second) of Agency, Judge Kaufman maintained that there was no valid application absent a bonafide fiduciary relationship. He also distinguished the policies controlling Federal securities regulation from those controlling in the instant case and concluded that application of Federal standards of conduct to a diversity action based on state law was inapposite. Finally, Judge Kaufman questioned the majority's failure to utilize Florida's certified question statute[30] to squelch all speculations as to what the Florida court would have held if the case had been heard in that forum.

---

[26] Case cited note 25 *supra*.

[27] Quinn v. Phipps, 93 Fla. 805, 113 So. 419 (1927) (confidential relationship extends not only to "technical fiduciaries" but also to those in possession of confidential information owned by another).

[28] RESTATEMENT (SECOND) OF AGENCY § 312 (1957). "[A] person who, without being privileged to do so, intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal."

[29] Moreover, sitting as a court of equity, the court emphasized its duty to weigh the equitable circumstances and in so doing could not deny that the corporation enjoyed a right superior to that of appellees.

[30] FLA. STAT. § 25.031 (1973):

> The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court (*sic*) of the United States, to any circuit court of appeals of the United States . . . that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer.

(Implemented: FLA. APP. R. 4.61).

In the instant case, the Second Circuit, by pioneering a legal concept, has enunciated two important policy decisions. Both comity and good economic policy inveigh heavily for an examination of their ramifications. First, as to the matter of controlling precedent, it seems perfectly proper for the Federal courts to seek guidance from other state jurisdictions when acting in diversity upon facts of first impression. Moreover, absent any indication as to which jurisdictions a state court would look to were it trying the issues, a Federal selection seems reasonable. But, when a state has not only suggested that the lack of precedent may be cured by certification to the native court but has also provided a mechanism therefore,[31] what further justification exists for application of another state's law? The Florida Legislature obviously intended that its legal policies should remain as undiluted by the possibly inapposite judicial renderings of diversity actions as possible. It should also be noted that the instant decision is based nominally on a very liberal expansion of New York's holding in *Diamond* but bears remarkable factual and punitive similarity to the SEC ruling in *Investors Management*,[32] an action brought under Federal law. To impose New York's standards upon the conduct of Florida's fiduciaries, whatever the resultant merits, seems unnecessary. But to impose upon Florida the persuasive weight of a broad Federal landmark in fiduciary regulation which even New York has not embraced for purposes of domestic fiduciary litigation, strains credulity. Without some compelling Federal interest in play, the proper authority seems to be Florida law as pronounced by a Florida court. The second matter, liability of mutual funds as tippees, especially as it bears upon state actions for breach of fiduciary duty, warrants examination. Some distinction should have been drawn between classes of tippees. Those individuals who receive a hot tip and with either actual or constructive knowledge of its illicit disclosure rely upon it to make a quick profit serve no interests but their own.[33] The corporation concerned is likely to fall into disrepute, responsible management suffers collectively for the misdeeds of the recreant insider and public confidence in business investments is diminished. This variety of conduct deserves proscription. Yet there are instances in which the utilization of inside information seems if not legitimate at least excusable, as in the instant case of utilization by mutual funds. Mutual funds serve as great mediums for the small-scale investor but they are more: they also serve as a collection center for all kinds of corporate information upon which management relies in overseeing the fund. To impose upon mutual funds a responsibility to thoroughly evaluate all information and to categorize it as "confidential," "public," "material" or "insignificant" would impede the very kind of investment which the funds foster. Valuable, legitimately usable information might become obsolete before it could be used; and the threat of recoupment of profits received unlawfully by tippees might discourage small investors from becoming involved. The restriction on mutual funds could close the market to all but the most affluent and concomitantly deprive the economy of a large amount of investment capital presently drawn from sources whose collective importance far outweighs their individual financial clout. The instant decision by its radical extension of tippee liability to mutual funds portends just such a result.

---

[31] *Id.*

[32] Case cited *supra* note 24.

[33] *See also* 119 U. Pa. L. Rev. 502 (1971).

Jackson Henderson Ables III

JURISDICTION—FORUM SELECTION—ATTACHMENT SUIT BASED ON FOREIGN CAUSE OF ACTION BY NONRESIDENT AGAINST FOREIGN CORPORATION SUFFICIENT TO CONFER QUASI IN REM JURISDICTION ON MISSISSIPPI COURT

Relying on the Mississippi attachment statute in chancery,[1] the appellant, a resident of Kansas, filed suit in the Chancery Court in the First Judicial District of Hinds County, Mississippi seeking to attach debts owed the appellee by companies doing business in Mississippi.[2] The appellant's claim was based on a personal injury which occurred in Kansas but was presently barred in that state by a 2-year statute of limitations.[3] On motion of the appellee the suit was transferred to the Federal District Court for the Southern District of Mississippi.[4] The appellee, incorporated in Delaware and having its principal place of

---

[1] MISS. CODE ANN. § 11-31-1 (1972), *formerly* MISS. CODE ANN. § 2729 (1942), provides as follows:

> The chancery court shall have jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto against any nonresident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such nonresident, absent or absconding debtor. The court shall give a decree in personam against such nonresident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an appearance.

The appellant also sought to obtain jurisdiction over the appellee by personal service on an employee of appellee residing in Mississippi on the assumption that appellee was "doing business" in Mississippi within the meaning of Mississippi law. *See* MISS. CODE ANN. §§ 13-3-57, 79-3-229, 79-1-29 (1972), *formerly* MISS. CODE ANN. §§ 1437, 5309-230 (Supp. 1972) & § 5346 (1942). The only issue on appeal, however, contested the district court's holding that jurisdiction was not obtained under the attachment statute.

[2] The attachment defendants and their respective debts to the appellee as admitted in their answers to writs of attachment were as follows: (a) Foremost-McKesson, Inc., a Maryland corporation, owed appellee $2,387,870; (b) Meyer Brothers Drug Company, a Missouri corporation, owed $55,248; and (c) the Mississippi Drug Company, a Mississippi corporation, owed $10,578. All three are drug wholesale firms which were present and doing business in Mississippi at the time of the filing of the complaint. The total of all monies owed the appellee by the attachment defendants was $2,458,996.17.

[3] Filing her complaint in 1970, appellant alleged that, as a result of her purchase and use of certain birth control pills manufactured and inadequately tested by the appellee drug company, she suffered a serious stroke on February 15, 1964, for which she seeks $500,000 in damages. The action is timely under Mississippi law. *Compare* MISS. CODE ANN. § 15-1-49 (1972), *formerly* MISS. CODE ANN. § 722 (1942) (6-year statute of limitations) *with* KAN. STAT. ANN. § 60-513 (1963) (2-year statute of limitations).

[4] 28 U.S.C. § 1441 (a) (1948) provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Original jurisdiction is conferred on the district court by virtue of the diversity of citizen-business in Illinois, contended, *inter alia*, that the court lacked jurisdiction of the person and filed a motion to dismiss.[5] The district court granted appellee's motion and dismissed the complaint finding that there was no jurisdiction under the Mississippi attachment statute and that Mississippi could not, consistent with the due process clause, exercise jurisdiction over the appellee.[6] On appeal to the Fifth Circuit Court of Appeals, *held*, reversed. The applicable state law clearly authorized jurisdiction over intangible property present in the state and involved in a suit by a nonresident against a foreign corporation, and the due process standards as mandated by the 14th amendment were not thereby violated. *Steele v. G.D. Searle & Co.*, 483 F.2d 339 (5th Cir. 1973).

Originally, all actions whether in personam, in rem, or quasi in rem[7] were "local" in the sense that the plaintiff was limited to bringing the action only where it accrued.[8] A great portion of modern litigation, however, tends to be transitory.[9] Consequently, jurisdictional law has endeavored to find an equitable balance between a desire to protect both plaintiffs from elusive defendants and defendants from vindictive, "forum shopping" plaintiffs.[10] The ultimate choice of forum will necessarily be influenced by the constitutional limitations on the type of jurisdiction which is obtained over the defendant.[11] Originally these limitations were determined under the full faith and credit clause of the Constitution.[12] This method was abandoned, however, in the latter part of the 19th century and judicial analysis of the constitutional limitations of jurisdiction came to be based on the due process clause of the 14th amendment.[13] The

---

ship of the litigants. *See* 28 U.S.C. § 1332 (1964).

[5] **Fed.** R. **Civ.** P. 12(b).

[6] The federal district court reasoned that although the technical requirements of the state's attachment statute had been complied with, jurisdiction was lacking over the foreign corporation defendant because the "obvious" intention of the statute was to deal with absconding debtors, "a status which would presuppose that the defendant was a former resident of the state who had removed himself from the process of the state courts." Furthermore, the district court determined that the state's only interest in the case would be jurisdictional since the appellant had resorted to Mississippi procedures "purely for the purpose of availing herself of this state's longer statutory period of limitations for her tort claim."

[7] For a general discussion of these three types of jurisdiction see **Restatement of Judgments** 1-9 (1942).

[8] *See* Blume, *Place of Trial of Civil Cases*, 48 **Mich.** L. **Rev.** 1, 9-28 (1949).

[9] Certain types of actions are said to be "local" in that they may only be tried in courts where the subject of the litigation is located, as compared to "transitory" actions which are not so restricted. In a transitory action it makes no difference whether the litigants are residents or nonresidents. *See, e.g.*, S & W Constr. Co. v. Douglas, 244 Miss. 498, 142 So. 2d 33 (1962); Tri-State Transit Co. v. Mondy, 194 Miss. 714, 12 So. 2d 920 (1943).

[10] *See generally* A. **Ehrenzweig, A Treatise on the Conflict of Laws** § 30 (1962).

[11] Hanson v. Denckla, 357 U.S. 235 (1958).

[12] U.S. **Const.** art. 4, § 1; *e.g.*, D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850).

[13] Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 **Mich.** L. **Rev.** 300, 304 (1970); *e.g.*, International Shoe Co. v. Washington, 326 U.S. 310 (1945); Harris v. Balk, 198 U.S. 215 (1905); Pennoyer v. Neff, 95 U.S. 714 (1878).

traditional guideposts for state court jurisdiction in the United States, both in personam and in rem, were handed down in the landmark case of *Pennoyer v. Neff*.[14] There the Supreme Court adopted the principle that each state had independent and exclusive power over all persons and property within the state's boundaries.[15] By way of historical interpretation, presence within the territorial limits of the forum,[16] consent in advance,[17] a general appearance in the action,[18] and the doing of an act subject to the police power of the state[19] have all constituted valid bases for personal jurisdiction. Additionally, jurisdiction consonant with due process can be exercised only where proper notice has been given the defendant.[20] The culmination of the historical trends in jurisdiction of the person is found in *International Shoe Co. v. Washington*[21] where the Court abandoned the prior tests of "presence" and "consent" and substituted the due process requirement that a nonresident have only certain "minimum contacts" with the forum state as to make it reasonable for him to defend there without violating "traditional notions of fair play and substantial justice."[22]

A state court is not precluded from granting relief in the absence of personal jurisdiction over the defendant. A device used by the courts to obtain jurisdiction over nonresident defendants is an action quasi in rem.[23] The term refers to the jurisdiction a court may assert over a defendant which is based on attachment procedures[24] and which enables the court to adjudicate the merits of an in personam claim.[25] The action is a hybrid of the in personam and in rem actions and has its historical roots in *Pennoyer v. Neff*.[26] An example of the quasi in rem action is Mississippi's attachment statute in chancery.[27] The statute allows a successful plaintiff to have a debt belonging to a "nonresident, absent or absconding"[28] defendant applied to the plaintiff's claim against the defendant.[29] The attachment remedy is purely statutory,[30] and the court's authority to proceed is considered "special" and "limited."[31] Historically, the purpose of similar statutes in England was to compel the appearance of the nonresident defendant by threat of default judgment.[32] Similarly, the common purpose of attachment legislation in the United States is to assure a successful plaintiff that his claim against an evasive defendant will be satisfied.[33]

---

[14] 95 U.S. 714 (1878).

[15] *Id.* at 722.

[16] *E.g.*, Milliken v. Meyer, 311 U.S. 457 (1940); *see* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 539 (7th ed. 1872). The concept of "presence" within a state was extended to include foreign corporations that have agents in the state by use of the "constructive presence" fiction. *E.g.*, Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264, 268 (1917); *see* Kurland, *The Supreme Court, the Due Process Clause and the in Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 572-73 (1958).

[17] *E.g.*, Adam v. Saenger, 303 U.S. 59 (1938); Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870). *See also* RESTATEMENT OF JUDGMENTS § 18 (1942).

[18] MISS. CODE ANN. § 11-31-1 (1972), *formerly* MISS. CODE ANN. § 2729 (1942), provides, in part:

> The court shall give a decree in personam against such nonresident, absent or absconding debtor . . . *if he has entered an appearance* (emphasis added).

The defendant may, however, appear "specially" to contest the court's jurisdiction. *E.g.*, Mladinich v. Kohn, 250 Miss. 138, 164 So.2d 785 (1964); Alabama Power Co. v. Jackson, 181 Miss. 691, 179 So. 571 (1938); First Nat'l. Bank v. Mississippi Cottonseed Prods. Co., 171 Miss. 282, 157 So. 349 (1934).

[19] *E.g.*, Hess v. Pawloski, 274 U.S. 352 (1927) (the fiction of "implied consent" was used to acquire personal jurisdiction over nonresident motorists). *See, e.g.*, MISS. CODE ANN. § 11-11-13 (1972), *formerly* MISS. CODE ANN. § 9352-61 (Supp. 1972). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 27 (1971).

[20] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); *see, e.g.*, Harris v. Balk, 198 U.S. 215, 227 (1905) (holding that "fair dealings" require notice to the defendant of the attachment action). *See also* RESTATEMENT OF JUDGMENTS § 6 (1942).

[21] 326 U.S. 310 (1945).

[22] *Id.* at 316.

[23] An action quasi in rem seeks to enforce a personal claim against a nonresident defendant by attaching any property owned by the defendant in the forum state. This is to be distinguished from an action in rem which adjudicates all interests in specific

The three essential elements of the action are statutory authorization,[34]

---

property as in an action to quiet title. *See* RESTATEMENT OF JUDGEMENTS § 3 (1942). Often the courts will refer to both actions as in rem, but a distinction should be made. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 247 (1958).

[24] Basically, the process of attachment involves filing with the court, the issuance of writs to the garnishees, and publication of notice to the defendants. *E.g.*, Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co., 197 Miss. 751, 21 So. 2d 646 (1945). *See also* 7 C.J.S. *Attachment* §§ 180 *et seq.* (1937).

[25] *E.g.*, Alabama, Tenn. & N.R.R. v. Howell, 244 Miss. 157, 166, 141 So. 2d 242, 246 (1962). *See also* F. JAMES, CIVIL PROCEDURE 630-34 (1965).

[26] 95 U.S. 714 (1878); *see* McDonald v. Mabee, 243 U.S. 90, 91; Comment, *Jurisdiction in Rem and the Attachment of Intangibles: Erosion of the Power Theory*, 1968 DUKE L.J. 725, 726-34.

[27] MISS. CODE ANN. § 11-31-1 (1972), *formerly* MISS. CODE ANN. § 2729 (1942). *See generally* 6 AM. JUR. 2d *Attachment & Garnishment* § 9 (1963).

[28] MISS. CODE ANN. § 11-31-1 (1972), *formerly* MISS. CODE ANN. § 2729 (1942).

[29] For a discussion of the principle involved see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 68 (1971).

[30] Attachment is a statutory proceeding which is considered to be in derogation of common law. *See, e.g.*, Rankin v. Dulaney, 43 Miss. 197, 202 (1870); *See also* 6 AM. JUR. 2d *Attachment & Garnishment* § 9 (1963).

[31] *E.g.*, Rankin v. Dulaney, 43 Miss. 197, 202 (1870). The court's jurisdiction over the defendant is said to be "limited" because in the event that in personam jurisdiction over the principal defendant is not obtained, either by his general appearance in the action, consent or otherwise, and a default judgment is rendered, the plaintiff in a quasi in rem action may recover only the amount of the debt that was the basis of the claim. F. JAMES, CIVIL PROCEDURE 630-34 (1965).

[32] For a discussion of the history of attachment actions see Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191, 194 (1937). *See also* Note, *Jurisdiction in New York: A Proposed Reform*, 69 COL. L. REV. 1412, 1415 (1969).

[33] *See* Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303, 304 (1962).

[34] *E.g.*, Ringold v. Goyer Co., 164 Miss. 261, 144 So. 706 (1932); Dogan v. Cole, 63 Miss. 153 (1885); Rankin v. Dulaney, 43 Miss. 197 (1870). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 68(b) (1971).

jurisdiction over the garnishee,[35] and reasonable notice to the defendant.[36] It is permissible for a state to limit the remedy of attachment to its own citizens,[37] but where no such restriction exists, a nonresident may take advantage of the statute under the privileges and immunities clause of the Federal Constitution.[38] Mississippi has long recognized the right of nonresidents to invoke its attachment statute,[39] has readily permitted the action when the garnishee-debtor was an interstate corporation rather than a natural person,[40] and has also allowed suit where the claim is based on a foreign cause of action.[41] Generally, Mississippi and other state courts have been content to declare the availability of the attachment remedy in such situations in reliance upon the particular statutory provisions involved without considering the fundamental constitutional questions which were raised during the historical development of in personam jurisdiction.[42] The leading case involving a quasi in rem action, *Harris v. Balk*,[43] gave a broad interpretation to this state court jurisdictional power by holding that a debt owed to a nonresident defendant could be attached by a plaintiff in whatever forum the garnishee could be found, thereby recognizing the constitutionality of the quasi in rem device.[44] As a result, it has been held that an attachment action by a nonresident plaintiff may be instituted against a foreign corporation owning intangible property within the forum state although the cause of action arose in another state.[45] Dismissal of such quasi in rem suits, however, has been allowed where there was a possibility of double liability to the garnishee,[46] where the procedure would impose an undue burden on a defendant corporation which was a common carrier engaged in interstate commerce,[47] or where the suit was brought in a seriously inappropriate forum (on the basis of the doctrine of forum non conveniens).[48]

---

[35] Keathley v. Hancock, 212 Miss. 1, 15, 53 So. 2d 29, 33-34 (1951) where the court stated that:

> [J]urisdiction to attach or garnish a debt is not dependent upon the abstract concept of the situs of the indebtedness in question, but rather upon the power of the court over the person of the garnishee, and, more particularly, upon the liability of the garnishee to suit in such court by his creditor.

For a discussion of the problems of a state court's power to attach intangibles see Comment, *supra* note 26.

[36] *E.g.*, Harris v. Balk, 198 U.S. 215 (1905); MISS. CODE ANN. § 11-31-9 (1972), *formerly* MISS. CODE ANN. § 2733 (1942), provides for notice and opportunity for the defendant to appear and be heard. *See also* RESTATEMENT OF JUDGMENTS § 3 (1942).

[37] *E.g.*, Ownbey v. Morgan, 256 U.S. 94 (1921). *See also* 6 AM. JUR. 2d *Attachment & Garnishment* § 62 (1963).

[38] U.S. CONST. amend. XIV, § 1. *See* Ownbey v. Morgan, 256 U.S. 94, 109-10 (1921) where the Court declared in an action of attachment based on a foreign cause of action that:

> [E]ach State is at liberty, if not under a duty, to accord the same privilege of protection to creditors who are citizens of other States that it accords to its own citizens.

See also 6 AM. JUR. 2d *Attachment & Garnishment* § 62 (1963).

[39] *E.g.*, Comstock v. Rayford, 9 Miss. 423 (1843) (nonresident plaintiff suing on a foreign debt by attaching nonresident defendant's personal property in Mississippi).

[40] *E.g.*, Snipes v. Commercial & Indus. Bank, 225 Miss. 345, 354, 83 So. 2d 179, 182 (1955) (holding that foreign corporations are persons within the meaning of Mississippi's attachment statute).

[41] *See* Alabama, Tenn. & N.R.R. v. Howell, 244 Miss. 157, 141 So. 2d 242 (1962) (dictum) (court stated in dictum that an action in rem could be maintained through attachment proceedings where the cause of action was for personal injuries received in a crossing accident in Alabama).

[42] *See, e.g.*, Hunt v. Gardner, 147 Miss. 374, 112 So. 7 (1927). *See generally* Annot., 14 A.L.R. 2d 420, 426 *et seq.* (1950). *But see* Clark v. Louisville & N.R.R., 158 Miss. 287, 130 So. 302 (1930) (holding that an attachment action brought by a resident on a foreign cause of action against a foreign railroad corporation was not unconstitutional).

[43] 198 U.S. 215 (1905).

In the present case, the court, after noting that an attachment suit could have been initiated in Federal court without impediment,[49] determined that its jurisdiction in the case was derivative. The court concluded that under the *Erie R.R. v. Tompkins* rule[50] its jurisdiction would be limited to that jurisdiction conferred on the Chancery Court of Hinds County by the attachment laws of Mississippi. After analyzing the Mississippi attachment statute[51] and the controlling case of *Alabama, Tenn. & N.R.R. v. Howell*,[52] the court concluded that

---

[44] *Id.* at 222, where the Court stated that: "Power over the person of the garnishee confers jurisdiction on the courts of the State where the writ [of attachment] issues."

[45] *E.g.*, Standard Oil Co. v. Superior Court, 62 A.2d 454 (1948), *appeal dismissed*, 336 U.S. 930, *rehearing denied*, 336 U.S. 955 (1948). *See also* Annot., *supra* note 42.

[46] *E.g.*, Weitzel v. Weitzel, 27 Ariz. 117, 230 P. 1106 (1924) (substantial chance of liability in another country where garnishee was a foreign national corporation).

[47] *E.g.*, Atchison, T. & S.F. Ry. v. Wells, 265 U.S. 101 (1924) (ruling that the commerce clause required dismissal of a quasi in rem action brought against a common carrier in an inappropriate forum). *Contra*, Clark v. Louisville & N.R.R., 158 Miss. 287, 130 So. 302 (1930).

[48] *E.g.*, Atchison, T. & S.F. Ry. v. Wells, 265 U.S. 101 (1924) (although decided on a constitutional question, the Court reached its conclusions on forum non conveniens grounds without invoking the doctrine by name). Mississippi has approved the doctrine, *see, e.g.*, Strickland v. Humble Oil & Ref., 194 Miss. 194, 11 So. 2d 820 (1943). It should be noted that the doctrine is not jurisdictional except to the extent that a constitutional question is involved and that it is uncertain whether the doctrine extends to corporations other than common carriers where a quasi in rem action is involved. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971).

[49] FED. R. CIV. P. 4(e) provides in part:

> Whenever a statute or rule of court of the state in which the district court is held provides . . . (2) for service upon or notice to (a party not an inhabitant of or found within the state) to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

[50] 304 U.S. 64 (1938) (held that Federal courts are bound by the state court decisions in interpreting state statutes in diversity suits).

[51] MISS. CODE ANN. § 11-31-1 (1972), *formerly* MISS. CODE ANN. § 2729 (1942).

[52] 244 Miss. 157, 141 So. 2d 242 (1962) (held attachment statute sufficient to confer in rem jurisdiction over foreign corporations).

Mississippi would view the present action as sufficient to establish quasi in rem jurisdiction over the nonresident defendant's property within the State. The court next considered the constitutional parameters of state court jurisdiction in the United States and noted that the substance of Federal decisions in this area was determined in *Pennoyer v. Neff.*[53] Combined with the territorial power over all persons and property within its borders conveyed by *Pennoyer*, the court reasoned that under the decision of *Harris v. Balk*[54] a state court could also gain jurisdiction by the attachment of intangible property, such as debts, as long as the garnished debtor could be located within the territorial borders of the state. The court noted that where such an action was instituted by a nonresident plaintiff, a question of the forum state's interest in the litigation was thereby raised. The court also noted, however, that in rem actions have not been restricted to plaintiffs of the forum state only,[55] and therefore concluded that the question would not be essential to the disposition of the present case. The court also considered the "minimum contacts" and the "fairness" standards established by *International Shoe Co. v. Washington*[56] for in personam actions, but noted that the in personam and in rem technicalities could not be assimilated for the purpose of determining the constitutional parameters of in rem or quasi in rem jurisdiction. The court cited *Hanson v. Denckla*[57] as upholding the ancient in rem-in personam jurisdictional distinctions, and also cited *Minichiello v. Rosenberg*[58] as substantiating the continued vitality of the quasi in rem attachment jurisdiction of the *Harris* case. Finally, the court noted that the appellee in the present case had established sufficient business contacts with the State of Mississippi to be amenable to suit in the State, and thereby reasoned that the appellee had satisfied the "minimum contacts" requirement of *International Shoe.*[59] The court therefore concluded that the exercise of state court jurisdiction in the present attachment action, and hence the derivative jurisdiction of the Federal court, was within the constitutional parameters of quasi in rem jurisdiction and did not violate the due process principles of fairness and territoriality mandated by the 14th amendment.[60]

The decision in the instant case is in accord with the historical line of cases governing state court jurisdiction. While the jurisdictional result is "technically" correct, it is based on a conceptual framework which invites and produces bad results. The framework was established by *Pennoyer v. Neff*[61] which based all state court jurisdiction on a theory of power over individuals, things, or intangibles found within the territorial purview of the state court. Even though the bases for in personam jurisdiction have undergone extensive reevaluation since *Pennoyer*, those for in rem matters have remained essentially unchanged. The difficulty with the present decision lies with determining the parameters of the hybrid quasi in rem action within this jurisdictional dichotomy. Continued resort to this conceptual framework in determining jurisdiction of attachment actions of this kind is unacceptable primarily for three reasons. First, the concept of quasi in rem jurisdiction is fictional and therefore has a limited value as precedent since it obscures the original purpose of the statutory remedy of attachment. Under the *Pennoyer* doctrine a plaintiff was burdened by the personal service requirement in obtaining in personam jurisdiction over nonresident defendants. Intended to ameliorate the restrictive concept of personal jurisdiction,[62] it is anomalous to continue to use the attachment device for purposes of obtaining jurisdiction over nonresident defendants in the face of the extended parameters of personal jurisdiction allowed by *International Shoe*.[63] A second problem with the present conceptual setting is that the quasi in rem term is itself objectionable. While the courts treat such actions with the mechanistic simplicity of ordinary in rem actions and proceed against the thing involved in the suit rather than the person of the defendant, they fail to recognize the fictive concept for what it really is. Regardless of the characterization of an action as in personam or quasi in rem, the courts are undertaking the adjudication of the legal interests of persons when they threaten to cut off ownership of intangible property within the forum state. This is particularly true when the attachment suit is based on a personal claim rather than a specific ownership interest of the plaintiff in the thing attached. It would follow from this view that nonresident defendants should be accorded the protective tests of fairness and reasonableness as in any other in personam action. Finally, the present action is patently unfair to the interests of the defendant and is unsupported by public interest arguments. By resorting to the quasi in rem fiction, the decision in the present case allows the plaintiff, wholly unrelated to the forum state, to have the defendant's liability to the plaintiff adjudicated in a forum unconnected with the cause of action and only "minimally" related to the defendant. Such jurisdiction is essentially unlimited in cases where the defendant is a multistate corporation having contacts in many states and makes the courts susceptible to "forum shopping" by the plaintiff while increasing the burden on the defendant. In similar actions based on long arm statutes granting in personam jurisdiction, the courts have dismissed suits initiated by nonresident plaintiffs against multistate corporate defendants based on foreign causes of action.[64] While pronouncing the "fairness" standard of *International Shoe* satisfied in the present action, the court failed to adequately justify the reasonableness of compelling a nonresident corporate-defendant to defend the suit in Mississippi. The only test of fairness espoused by the court in the present action seems to be whether the foreign corporation had any commercial interests in the forum state that would make it familiar with that state's laws. This treatment of the fairness standard is cursory and such a test would give every state in which the corporate defendant has business contacts an interest in this litigation without ever deciding the "rational nexus between the fundamental events giving rise to the cause of action and the forum state"[65] or assessing the appropriateness of Mississippi as a forum to litigate the claim. It is here suggested that the traditional concepts of state court jurisdiction discussed in the present case, and particularly the fictive quasi in rem attachment mechanism, need to be reexamined, and the same notions of fundamental fairness to the defendant and due process espoused in *International Shoe* should be applied equally whether an individual or corporation is proceeded against directly by in personam actions or indirectly through the device of quasi in rem jurisdiction.

---

[53] 95 U.S. 714 (1878).

[54] 198 U.S. 215 (1905).

[55] Ownbey v. Morgan, 256 U.S. 94 (1921).

[56] 326 U.S. 310 (1945).

[57] 357 U.S. 235, 246-55 (1958).

[58] 410 F.2d 106 (2d Cir. 1968) (upholding the validity of New York statute granting quasi in rem jurisdiction).

[59] International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[60] U.S. Const. amend. XIV, § 1.

[61] 95 U.S. 714 (1878).

---

[62] *See* Carrington, *supra* note 33, at 304.

[63] International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[64] *E.g.*, Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952) (a state is not compelled to open its courts to a case where suit is brought against a foreign corporation by a nonresident to litigate a claim unrelated to the state); Curtis Pub. Co. v. Birdsong, 360 F.2d 344 (5th Cir. 1966) (tort action brought in Alabama courts by Mississippi resident against Pennsylvania company violates due process protection of defendant); New Amsterdam Cas. Co. v. Estes, 353 Mass. 90, 228 N.E.2d 440 (1967) (court declined quasi in rem jurisdiction because litigation could be more appropriately con-

E. Stephen Williams

---

ducted in another forum).

[65] Curtis Pub. Co. v. Birdsong, 360 F.2d 344, 346 (5th Cir. 1966) (*International Shoe* was interpreted as requiring a rational nexus between the forum state and a foreign tort claim before litigants could be constitutionally compelled to defend in that state); *accord*, Ratliff v. Cooper Laboratories, Inc., 444 F.2d 745, 748 (4th Cir. 1971); Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968).

BOOK REVIEW

A PUBLIC CITIZEN'S ACTION MANUAL by DONALD K. ROSS. New York: Grossman Publishers. 1973. $1.95 (paper).

*Stanley L. Taylor, Jr.**

The consumer movement has made impressive achievements since the days when Ralph Nader was going it alone. It is still a disjointed movement, struggling for cohesiveness, with very little grass-roots following or support. But it no longer can be ignored by government and industry. The turning point came under the garish television lights of a Senate hearing room in 1966 when James Roche, then president of General Motors, made his public apology to Nader for hiring snoopers to investigate his personal life. Thus was launched the public career of this extraordinary individual, and as a bonus Nader received a $400,000 settlement from G.M. for an invasion of privacy suit, a sufficient stipend to set in motion whistle-blowing activities on a more impressive scale. The study groups popularly referred to as "Nader's Raiders" have published a wide range of exposes, including examinations of the FTC, the Food and Drug Administration, Du Pont in Delaware, Water and Air Pollution, the ICC, and the Bureau of Reclamation. They are so prolific, that trying to keep up with their publications is like trying to survive an avalanche by swimming at the top of the snow slide.

The clearest lesson which the Nader study groups have taught is that government is the captive of corporate power—a "bustling bazaar of accounts receivable" for industry and commerce.[1] John Kenneth Galbraith calls this blurring of corporate and public interests "bureaucratic symbiosis."[2] But, where Galbraith calls for "a new socialism"[3] of public competition with private enterprise, the intent of this latest Nader publication is to encourage individual participation in fighting back against big government and big business, or even against little government and little business. Citizen involvement has not been encouraged in any meaningful sense until recent years, and its recommendation now is at least a tacit recognition that nothing else is likely to work.

For the frustrated consumer who decides that direct action is preferable to sheepishly accepting the shaft, A PUBLIC CITIZEN'S ACTION MANUAL provides detailed primers covering everything from "How to Lower the Price of Prescription Drugs" (lobby for a municipal ordinance permitting generic substitutions) to "How to Improve the Image of Women in Textbooks" (pressure your schools to use only those books approved by the Feminists on Children's Media). There are sunbursts of pure brilliance included in these selections, such as the manner in which an environmental protection group selected the 12 congressmen who had most consistently voted against environmental programs, labeled them the "Dirty Dozen," and campaigned effectively against them. And, of course, there are partial eclipses, such as "How to do a Bank Interest Survey," which somehow fails to get the juices flowing.

---

*Attorney, North Mississippi Rural Legal Services.

[1] M. MINTZ & J. COHEN, AMERICA, INC., WHO OWNS AND OPERATES THE UNITED STATES xi (1971) (Introduction by R. NADER).

[2] J. GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE (1973).

[3] Galbraith's "new socialism" differs from the more traditional populist approach which Nader reflects. Where Nader's remedies for the abuses of big business center around effective antitrust measures, Galbraith advocates nationalization of industry in sectors such as medical care, housing and transportation where the grossest inequities and deprivations occur, as well as public ownership of specialized weapons firms which already do more than half of their business with the government.

Mr. Ross devotes much of his time to the organization and activities of local Citizen's Action Groups and Student Public Interest Research Groups (PIRG's). The impressive successes of such groups are noted throughout the book. It is clear that some degree of cross-fertilization has already begun among these public-interest groups, and the clear intent of the author is to develop a network of programs in each state.

It is no secret that big business is represented by skilled lawyers, lobbyists, and public relations specialists. To represent the public interest against these specialists requires an equally sophisticated approach by a broadly based national movement. Development of a broad constitutency has been stymied for years by the inability to generate sufficient financial resources and to stimulate direct involvement at the local level. Common Cause has been successful in its brief existence by requiring $15 annual dues from hundreds of thousands of members and by limiting its focus to procedural reform of the elective process. But much more is needed, and the expectation of more extensive local participation with sufficient manpower and resources to apply to problems is not unrealistic when you consider the potential constitutency of 200 million consumers who presently rely on a few national spokesmen and organizations to carry the fight.

This call to arms is not just a suggested treatment for the liberal "blahs." It is a genuine attempt to develop a "well-honed instrument for change." The suggested projects are designed to provide local groups with opportunities for initial successes which will stimulate an appetite for more difficult achievements. The process begins with the realization that the name of the game in America is not justice but power. Labor and civil rights activitists learned this many years ago and their devotion to direct action can be emulated by citizen and student groups who seek to develop a countervailing force against the regulatory-industrial complex.

BOOK NOTES*

After Conviction by Ronald L. Goldfarb and Linda R. Singer. New York: Simon and Schuster. 1973. Pp. 733. Attorneys Ronald Goldfarb and Linda Singer present an in-depth analysis of the criminal justice system from the sentencing process to community corrections alternatives, arriving at the inescapable conclusion that the whole system simply fails to work. The authors expose a system which in theory is dedicated to the prevention of crime and the rehabilitation of the offender but in reality is a woeful failure. Beginning with the assumption that the ". . . walls—and all they lead to and represent—must come down. . . ," they forcefully argue for the evolution of an "alternative system that does not rely fundamentally on imprisonment and prison institutions." While conceding the existence of those few individuals that must be confined, Goldfarb and Singer conclude that the great majority of those in prison are kept there to the detriment of society as well as themselves. The authors see no hope for reform as long as "reform" means little more than modern facilities, differing only in their appearance from those maximum security prisons which have spawned Attica-type riots. Many parts of the system, such as parole and probation, are "administered in high-handed, aloof, closed, unresponsive and undemocratic ways," so that failure is inevitable. Meaningful reform of the present correctional system can only begin with a dedication to the preservation of the dignity of man. For those interested in penal reform, **After Conviction** provides not only an indictment of the present system, but also a plan for the future—one that is not "brutalizing to all involved . . . toxic to the social system . . . and subversive of the brotherhood of man."

The Equal Employment Opportunity Act of 1972, Washington, D.C.: Bureau of National Affairs, Inc. 1973. Pp. 423. $12.50. The Equal Employment Opportunity Act (EEOA) of 1972 amended various provisions of Title VII of the Civil Rights Act (CRA) of 1964. The most fundamental of these changes was in the nature of enforcement powers granted to the Equal Employment Opportunity Commission. In an attempt to provide a guide through the maze of Federal fair employment practice laws and the relevant changes, the editorial staff of the Bureau of National Affairs (BNA) outlines the major aspects of Federal fair employment practice laws, the changes wrought by the 1972 amendments, and the manner of application of those laws toward employers, employees, unions, employment agencies, and state and local governments. The laws' provisions are presented as danger zone warnings so that the reader may be readily able to recognize problem areas. To facilitate explanation of the EEOA and the CRA, portions of the Acts are paraphrased and key definitions are presented. Few conclusions concerning the Acts are actually drawn by the BNA staff. For deeper analysis reference is often made to secondary material and significant cases. It is these secondary references which will provide the greater guidance to criteria used in determining the laws' applicability.

---

*Prepared by the staff of the *Mississippi Law Journal*. The inclusion of a book in this section does not preclude subsequent review.

Since the EEOA does not provide an exclusive remedy for employment related discrimination, the BNA manual presents alternative modes of procedure, *e.g.*, action before the National Labor Relations Board. A brief analysis of state fair employment practice laws is also included but the coverage of Mississippi law is limited since Mississippi is one of nine states without a fair employment practice law. A history of Federal fair employment practice legislation is likewise given with particular attention to the evolution of the EEOA.

The first 20 percent of the book is devoted to editorial analysis; the remainder consists of reprinted matter such as congressional debates, committee reports, and statutory text. The book does not purport to provide any in-depth analysis or prognostication of what is to come and should not be consulted for that purpose. Rather, it is a compilation of material pertinent to a working knowledge of Title VII of the CRA and its legislative history. Therein lies the book's worth.

If you have the JOURNAL,
you need the INDEX!

MISSISSIPPI LAW JOURNAL
CUMULATIVE INDEXES

New Index for Volumes 31-40	$ 6.00
Index for Volumes 21-30	2.50
Index for Volumes 1-20	2.50
Complete Set of Above Indexes	$10.00

Send order to:

MISSISSIPPI LAW JOURNAL
P. O. Box 146
University, Mississippi 38677

ALL RATES ON PASSBOOKS AND TIME CERTIFICATES NOW INCREASED — EARN UP TO 7¾%

We make
Your Savings
OUR BUSINESS
NORTH MISSISSIPPI Savings & Loan
North Mississippi Savings & Loan Assoc.

Helping you serve your clients' trust

The financial advice and counseling you give determines your clients' future. That is why you should know about the many ways the Trust Department of First National Bank can help you serve your clients better. Whether it be retirement plans, estate planning, investment management, or other fiduciary services, call on our experienced trust men to help you plan a better future for your clients.

First National Bank

JACKSON, MISS. MEMBER: FDIC

Branches: Commercial National Bank, Greenville/Leland; First National Bank, McComb; The Bank of Greenwood, Greenwood; Amite County Bank, Gloster/Liberty; Tylertown Bank, Tylertown.